

IN THE HIGH COURT OF TANZANIA
LABOUR DIVISION
DAR ES SALAAM
REVISION NO. 535 OF 2020

BETWEEN

DELTA AFRICA LIMITED APPLICANT

AND

IRENE ANGELA JOSEPH..... RESPONDENT

JUDGMENT

Date of last order: 9/03/2022
Date of Judgement: 09/03/2022

B. E. K. Mganga, J.

The employment relationship between the parties herein commenced on 1st April 2011 when the respondent was employed to deal with Administration and Accounts. The parties maintained their employment relationship until on 12th April, 2017, when the respondent filed Labour dispute No. CMA/DSM/KIN/R.440/17 before the Commission for Mediation and Arbitration henceforth CMA at Kinondoni alleging that her employment was unfairly terminated by the applicant. In the CMA F1, respondent indicated that the dispute arose on 15th March 2017. In the same CMA F1, respondent indicated that she was claiming for

reinstatement and payment of TZS 150,000,000/= as general damages and TZS 7,000,000/= as specific damages. She indicated further that, no disciplinary hearing was conducted and no evidence tendered as she was deprived right to be heard.

On 2nd December 2020, Hon. Nyagaya, P, arbitrator, having heard evidence of both parties, delivered her award in favour of the respondent as she found that termination of employment of the respondent was unfair both substantively and procedurally. The arbitrator therefore ordered the respondent be reinstated without loss of TZS 30,800,000/= remuneration or if the applicant fails to reinstate her, should pay a total of TZS 39,200,000/= i.e., TZS 30,800,000/= remuneration for 44 months that respondent was not paid due to unfair termination and TZS 8,400,000/= being 12 months compensation for unfair termination.

Applicant was aggrieved by the said award, as a result, she filed this application for revision. In the affidavit affirmed by Mohamed Araz, the Director of the company in support of the notice of application, the deponent deposed that, respondent was not terminated rather, absconded from coming to office in February 2017 after she was paid

salary for the month of February 2017. The deponent raised six (6) issues namely: -

1. *Whether the arbitrator directed herself properly to hold that the respondent was unfairly terminated while in fact the labour dispute was prematurely filed as the respondent was not terminated.*
2. *Whether the trial commission directed itself properly to order 44 months salaries at consideration of 700,000/= while in fact the salary for each month was 500,000/=*
3. *Whether the trial commission directed itself properly to hold that the respondent was unfairly terminated while in fact the respondent failed to prove the said termination.*
4. *Whether the trial commission evaluated properly the evidences tendered before it.*
5. *Whether the trial Commission directed itself properly by considering the evidence of the respondent leaving out the applicant's evidence tendered before the court.*
6. *Whether the trial Commission directed itself properly to grant the respondent compensation in disregard of the position of the law.*

The respondent resisted the application by filing her counter affidavit. In the said counter affidavit, respondent refuted the allegation of abscondment on ground that she was unfairly terminated by the applicant and maintained that the award was properly issued in her favour.

When the application was called for hearing, parties prayed the same to be disposed by way of written submissions, the prayer which was granted.

Submitting in support of the application, Advocate Dickson Sanga for the applicant, kicked off by submitting that, respondent's counter affidavit was filed out of time contrary to Rule 24(4)(a) of the Labour Court Rules, GN. No. 106 of 2007. Counsel for the applicant submitted that the law requires the counter affidavit be filed within fifteen (15) days from the date of being served with application. He added that applicant served the respondent with the notice of application on 18th January 2021, but the respondent filed the counter affidavit on 29th March 2021 while out of the said fifteen days without leave of this court contrary to the law.

I should quickly point out that, on 29th March 2021, when the application came for the first time before my learned sister Hon. Z. G. Muruke, J, Mr. Dickson Sanga, counsel for the applicant raised a concern that the counter affidavit was filed out of time but he made no prayer before the court as to what should be done in relation to that counter affidavit. In response to that issue, respondent submitted that she was late as she was looking for her advocate one George Magambo. As there

was no prayer as to what should be done in relation to the said counter affidavit that was filed out time, no order was issued by the court. In my view, if counsel for the applicant wanted the said counter affidavit to be expunged from the record, he should have so prayed, and the court would have made an appropriate order thereof by expunging it and granting leave to the respondent to file another counter affidavit. In my view, as counsel for the applicant did not move the court as to what should be done, it seems, he had no intention for the said counter affidavit to be expunged and cannot bring the same issue now. By the way, counsel for the applicant has failed to explain how that prejudiced the applicant's case. I therefore find that complaint as inconsequential.

Submitting on the issues raised in the affidavit in support of the notice of application, Mr. Sanga, counsel for the applicant, argued the 1st and 3rd issues together namely; whether arbitrator directed herself properly in holding that respondent was unfairly terminated and whether respondent proved that she was unfairly terminated. Counsel for the applicant cited the case of ***Abdul-karim Haji v. Raymond Nchimbi Alosi and Another, [2006] T. L. R 420*** and argued that respondent was duty bound to prove that she was unfairly terminated. Counsel for the applicant submitted that the alleged termination letter

(exh.C3), coming late to office (exh. C1) and terminal benefit due to the respondent (exh.C4) bears no name and signature of the author and stamp of the applicant, as such, cannot be relied upon. Counsel for the applicant cited this court's decision in the case of ***Prucheria John v. Wilbard Wilson and William Wilson, Land Appeal No.64/2019*** (unreported) to the effect that authenticity of these exhibits is questionable for lack of both the name and signature of the author. Mr. Sanga submitted further that, respondent was duty bound to prove that she was terminated and cited the case of ***Said Seleman & 13 Others v. A-one Product and Bottlers Ltd Rev. No. 890 of 2018*** to bolster his argument. He concluded that respondent failed to discharge that duty.

Counsel for the applicant relied on evidence of **Nainesh Bhat** (DW1) and submitted that respondent stopped coming to work in February 2017 after she was paid salary for February 2017 and that, she was not terminated. Counsel for the applicant argued further that respondent filed the dispute at CMA prematurely as there was no termination and that the same ought to have been dismissed. To support his argument, counsel for the applicant cited the case of

Neema Ludovick & Others v. Tridea Cosmetics Ltd [2013] LCCD

1.

Regarding the 2nd issue namely; whether; the arbitrator directed herself properly to order 44 months salaries compensation at consideration of TZS 700,000/=; Mr. Sanga, counsel for the applicant, submitted that respondent's salary was TZS 500,000/= per month and not TZS 700,000/= as it was testified by Nainesh Bhatt(DW1) and clearly shown in "pay as you earn(PAYE) and NSSF contributions that were admitted as exhibit D1 collectively. Counsel for the applicant went on to submit that authenticity of exhibit C1 that was tendered by the respondent is questionable and that the same cannot be relied upon. Mr. Sanga, submitted further that, apart from exhibit C1, respondent did not tender salary slip to prove that she was paid TZS 700,000/=.

On the 4th issue namely, whether; the commission evaluated properly evidence adduced; Mr. Sanga, submitted that arbitrator did not properly evaluate exhibits C1, C3 and C4 all that had no name or signature of the author. He submitted that, had the arbitrator properly evaluated evidence of the parties, she would have not arrived to the same position she did. Counsel for the applicant concluded by praying

the court to allow the application by quashing and setting aside the award.

In resisting the application, Mr. George Magambo, the personal representative of the respondent, contended that, evidence that was adduced by the respondent clearly proves that respondent was terminated. Mr. Magambo, the personal representative of the respondent submitted that Mr. Mohamed Araz, the immediate supervisor of the respondent was not called by the applicant to testify, instead, applicant called Mr. Nainesh Bhatt, who knew nothing. Mr. Magambo went on that, the claim that termination letter (exh. C3) bears no name and stamp of the applicant has no merit because the Human Resources Manager was not called to testify to deny or affirm that the signature appearing on the said exhibit belongs to him or not. The personal representative of the respondent submitted further that, respondent was not afforded right to be heard at the time of termination and that this breached the principles of natural justice. He cited the case of ***Simon Manyaki & Another v. the Executive Committee of the Institute of Finance management, Civil cause No. 42 of 1984***. He argued further that, the procedure for termination provided for under Rule 9(1)

of the Employment and Labour Relations (Code of Good Practice), GN. No. 42 of 2007 was not complied with.

On the salary respondent was being paid, Mr. Magambo submitted that, applicant tendered both PAYE and NSSF contributions showing that respondent's salary was TZS 500,000/= but skipping to show payments for February 2014 backward that would have proved that respondent's salary was TZS 700,000/=. Mr. Magambo submitted that, this was so done to hide illegal deductions that was done and complained of by the respondent. Mr. Magambo distinguished cases cited by counsel for the applicant relating to signature and submitted that the same are not applicable in the application at hand.

On the relief the respondent was entitled to, Mr. Magambo submitted that in terms of section 40(3) of the Employment and Labour Relations Act [Cap. 366 R. E. 2019], since applicant was unwilling to reinstate or reengage the respondent, she was obliged to pay all salaries due from the date of termination and compensation of 12 months salaries for unfair termination.

I have carefully examined evidence of the parties in the CMA record, the affidavit in support of the application, the counter affidavit in opposition of the application and submissions made thereof on behalf of

the parties and find that the main rival issue is whether; respondent's employment was terminated by the applicant or not. If it was terminated by the applicant, whether; it was done fairly or not, and reliefs thereof.

It was strongly submitted by Mr. Sanga, counsel for the applicant that respondent's employment was not terminated by the applicant rather, respondent absconded after being paid salary for February 2017. On the other hand, it was the contention of Mr. Magambo, the personal representative of the respondent that respondent was unfairly terminated. Mr. Sanga submitted that authenticity of exhibits C1, C3 and C4 relied upon by the respondent to prove that she was unfairly terminated is questionable for lack of the name and signature of the author and stamp of the respondent. On the other hand, Mr. Magambo, the personal representative of the respondent raised an issue on failure of the applicant to call key witnesses to testify including the one who signed termination letter (exh.C3). In my view, all these can be cleared by looking on evidence of **Nainesh Bhat(DW1)**, the Financial System Analysis Manager of the applicant who is the only witness who testified on behalf of the applicant and that of **Iren Joseph (PW1)**, the respondent. In his evidence, DW1 while testifying in chief, he is recorded stating:-

"...Mr. Araz Mohamed is the director of Delta. In February 2017 after receiving salary she came to work for two days after that disappeared. I write letters of the company then my boss Mr. Araz sign them then I put stamp. Therefore I am the one who write the letter on behalf of the company. I know Irene her salary was 500,000/= per month. I have all evidence to prove..."

It can be recalled that the only evidence to prove that respondent's salary was TZS 500,000/= was NSSF and PAYE that were tendered collectively by DW1 as exhibit D1. DW1 was very brief in his evidence in chief and did not cover many aspects or issues. Brief as he was, that is the only evidence available in favour of the applicant, which can be used by this court to revise or uphold the award in question.

While under cross examination, Dw1 is recorded stating that Irene reports to Mr. Araz and that he doesn't remember the date she disappeared from work, but it was in March. Dw1 admitted that he was not the secretary and maintained that office records show that Irene's salary was 500,000/=. He admitted further that he did not tender salary slip for 2014 and stated that if needed, he may bring them.

While under re-examination, DW1 is recorded stating that NSSF and PAYE (exh. D1 collectively) are genuine documents as they bear a stamp and log. He testified further that, after disappearance of the respondent,

no action was taken as they thought may be, she had family problem but later on, they were served with summons to appear at CMA.

In her evidence, Irene Angela Joseph (Pw1) is recorded stating while giving her evidence in chief as follows:-

"...nilikuwa naripoti kwa Mr. Araz Mohamed ambaye ni CEO. Nilikuwa napokea mashahara wa Tsh 700,000/= lakini ilipofika 2014 nilichelewa kufika ofisini mwezi wa 4 sababu nilikuwa na mtoto mdogo hivyo boss akasema kwa mwezi huo atanikata laki 2...nililalamika lakini sikusikilizwa...Niliendelea na kazi kama kawaida mpk(sic) 2017 bosi wangu alinielea kuna hela zimepotea na mimi nimekosa uaminifu kwa kushiriki ktk(sic)upotevu huo, niliomba kusikilizwa lakini hakuniruhusu nikapewa barua ya kuachishwa kazi.

Dickson: hatuna pingamizi

Tume: Barua ya kuachishwa kazi, EXB C3

Baada ya kupewa barua hiyo nilipigiwa hesabu na wakili wa mwajiri anaitwa Thomas Chubwa nikapewa notisi ya mwezi mmoja; naomba ipokelewe barua hii.

Dickson. Hatuna pingamizi

Tume: terminal due letter, EXB C4

...shahidi aliyetoka wa m/kiwa (sic) anasema niliondoka mwenyewe hii si kweli mimi niliachishwa kazi. Na baada ya tarehe hiyo sikuwahi kuwasiliana na mtu yeyote pale ofisini..."

On cross examination, PW1 stated that she was not informed the amount of money allegedly went missing and that there is no name of Mr. Araz, the CEO on termination letter (exh. C3). That, her employment was terminated by the said Araz.

In re -examination, PW1 stated that the said termination letter exh. C3 was handed to her by Mr. Araz. She maintained that terminal due letter was written by Thomas Chubwa and that she was paid cash in hand.

Having discussed evidence that was adduced at CMA by the parties, it is opportune now to address the issues raised hereinabove. Mr. Nainesh Bhat (DW1), testified that respondent disappeared from work after being paid February 2017 salary. DW1 testified further that after disappearance of the respondent from work, applicant took no action as she thought that respondent might have family problems. Irene Angela Joseph (PW1), respondent, testified that her employment was terminated by Mr. Araz Mohamed the CEO of the applicant. She testified further that, she was served with termination letter (exh. C3) by the said Araz Mohamed. It is my view that, termination or abscondment of the respondent can be decided based on credibility of these two witnesses. In the award, the arbitrator found PW1 more credible and accepted the version of her evidence that she was terminated.

It has been held several times by the Court of Appeal that where the decision is based whole on credibility of the witness, then, it is the

trial court which is better placed to assess their credibility than the appellate Court which merely reads the transcripts of the record and that, the trial court's findings as to credibility of witness is usually binding on an appeal court unless there are circumstances on the record which call for reassessment of their credibility. See the case of ***Ali Abdallah Rajabu v. Saada Abdallah Rajabu & Others [1994] TLR 132***, ***Omari Mohamed v. R [1983] TLR 52***, ***DPP vs. Jaffer Mfaume Kawawa [1981] TLR 149*** and ***Adventina Alexander v. R, Criminal Appeal No. 134 of 2002*** (unreported) to mention but a few. This being an application for revision, I am therefore duty bound to scrutinize evidence and see whether; the evidence of the respondent (PW1) and that of DW1 is worth to be believed or not. In so doing, I will be guided by the decision of the Court of Appeal in the case of ***Goodluck Kyando v. Republic, [2006] T.L.R 363*** wherein it was held by the Court of Appeal that:-

"Every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing a witness."

Again, in the case of ***Patrick s/o Sanga v. The Republic, Criminal Appeal No. 213 of 2008***, (unreported) the Court of Appeal held:-

"...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..."

Being alert with ***Kyando's case*** and ***Sanga's case*** in my mind, I find that the arbitrator correctly disbelieved the story of DW1 that respondent did disappear after she was paid salary for February 2017. The reason for this conclusion is not far. If at all respondent absconded from duty as DW1 wants the court to believe, then, it was expected DW1 to explain disciplinary measures that were taken by the applicant against the respondent because abscondment for more than five days without justification is a ground for termination of employment. It is beyond comprehension that an employee stopped to attend at work for sometimes and no action was taken by the applicant (the employer). It was expected that the applicant (the employer) would have taken action including but not limited to warning or termination of respondent's employment for ground of absenteeism. It is my view that, the story that applicant failed to take any action as she thought respondent had family problem was a naked lie laden with embellishment than facts

intended to hide the truth. In my view, the conduct of the applicant is not the one expected of, by any reasonable employer. I fail to get any logical or piece of truth in that story.

On the other hand, the arbitrator believed the evidence of PW1 that she was unfairly terminated. From the quoted evidence of PW1, it is clear that she was served with letter of termination of her employment (exh. C3) by Mr. Araz Mohmed, the Chief Executive of the applicant. It was argued by Mr. Sanga, counsel for the applicant that exhibit C3 bears no name and signature of the author and that it has no stamp hence its authenticity is questionable. That criticism, in my view, is not founded because the evidence of PW1 is clear that she was served with that letter by Mr. Araz Mohmed, the CEO of the applicant. Absence of the name of the author on exhibit C3 does not disapprove that the same was handled over to the respondent by the said Araz Mohmed who was the immediate supervisor of the respondent. In additional to that, I have examined the said exhibit C3 and find that it was signed by Human Resources Manager. Incidentally, neither the said Human Resources Manager nor the CEO was called by the applicant to testify at CMA. In my view, it is only the two who could have cleared doubt as whether;

the said document was authored by them and handed to the respondent or not. It is also clear from the quoted evidence of the respondent hereinabove that the said termination letter (exhibit C3) was admitted in evidence without objection by the applicant. The said exhibit was tendered in the presence of Mr. Sanga advocate for the applicant, who at that time, took no trouble to raise objection, now is challenging the same document. In my view, arguments advanced by counsel for the applicant in relation to the said termination letter (exh.C3) is an afterthought and cannot be accepted.

Mr. Sanga, counsel for the applicant submitted that termination letter (exh. C3), coming late to office (exh. C1) and terminal benefit due to the respondent (exh. C4) bears no name and signature of the author and stamp of the applicant, as such, cannot be relied upon. Counsel for the applicant cited *Prucheria's case* (supra) to support his argument. I should point out that, these exhibits were tendered without objection from Mr. Sanga, advocate who incidentally is the one who represented the applicant at CMA. I have examined PAYE and NSSF contributions (exh D1 collectively) that were tendered by DW1 and find that (i) apart from bearing the rubber stamp of the applicant, the same bears neither

name nor signature of the author (ii) no proof that the annexures to the Tanzania Revenue Authority control No. 15493974 value dated 10/01/2017, control No. 15683579 value dated 10/02/2017 and Control No. 15859190 value dated 10/03/2017 has no connection with pay as you earn tax (PAYE). I am of that view because there is no indication to these control numbers showing that the amount that was received relates to PAYE. There is also a possibility that applicant was discharging her tax liability other than PAYE. Unfortunately, DW1 did not explain in detail in his evidence. On the other hand, I have noted that in the NSSF contributions, names of employees were changing and that in December 2016, salary of Araz Mohamed was TZS 4,000,000/= but in January and February 2017 that salary decreased to TZS 3,000,000/= and no explanations were offered. The least I can say, these exhibits are not reliable.

Mr. Sanga, counsel for the applicant submitted that exhibit C1, C3 and C4 should not be relied on or acted upon, as they do not bear name and signature of the author. If that submission has to be accepted, then, exhibit D1 collectively tendered by DW1 also has not to be acted upon for the similar reason. I don't think that I need to go that far.

In connection to the above, applicant had ample time to prepare her case because all documents applicant's counsel is complaining against including termination letter (exhibit C3) were served to her in terms of Rule 24(6) of the Labour Institutions (Mediation and Arbitrations Guidelines) Rules, GN. No. 67 of 2007 prior the parties calling their witnesses. In my view, applicant knew existence of these documents and failed to call the Human Resources Manager and the CEO to testify on his part. There is a litany of cases to the effect that failure to call a key witness, may in certain circumstances entitle the court to draw adverse inference against the party who failed to call that witness. One of those cases is the case of ***City Coffee Ltd v. the Registered Trustee of Iloilo Coffee Group, Civil Appeal No. 94 of 2018*** (Unreported). I therefore draw adverse inference against the applicant for his failure to call the Human Resources Manager and the CEO to testify at CMA. That said, I hold as the arbitrator did, that employment of the respondent was terminated by the applicant contrary to what applicant alleges that she absconded. Having so held, I proceed to hold that the said termination was unfair both substantively and procedurally as there is no evidence to prove the contrary.

The issue of salary that respondent was receiving was highly contested both at CMA and in the submissions of the parties in this application. At CMA, DW1 testified that respondent was receiving TZS 500,000/= as monthly salary, but respondent (PW1) testified that her salary was TZS 700,000/= but it was unlawfully reduced to TZS 500,000/= as punishment as she once arrived at work late. While under cross examination, DW1 conceded that no salary slips showing salary of the respondent was tendered. DW1 promised to submit them if needed. In his written submission, Mr. Sanga, counsel for the applicant argued that respondent was duty bound to prove that her salary was TZS 700,000/= but she failed to discharge that burden. With due respect to counsel for the applicant, that position is not correct. In terms of section 15(1)(h) of the Employment and Labour Relations Act [Cap. 366 R.E 2019] applicant/employer was under duty to supply to the respondent with particulars relating to remunerations, method of its calculation and details of any benefits or payments in kind. This statutory duty cannot, in any case, be shifted to the employee or the respondent in the application at hand. More so, in terms of section 15(5) of Cap. 366 R.E 2019 (supra), an employer is required to keep the particulars mentioned under section 15(1), documents relating to remuneration inclusive, for

the period of five years after termination. Therefore, there is no room for the applicant to shift burden to the respondent. To seal it, section 15(6) of Cap. 366 R. E. 2019 (supra), provides that the burden of proving any particular under section 15(1) of Cap. 366 R. E. 2019 (supra), salary inclusive, is on the employer(applicant).

In her evidence, Respondent (PW1) tendered terminal dues (exh. C4) stating that she was paid One month salary in lieu of Notice, seven days worked for and severance pay. She testified that the said document was authored by Thomas Chubwa, counsel for the applicant. I have examined that exhibit and find that respondent was paid TZS 500,000/= as one-month salary in lieu of notice. I therefore hold that relief of the applicant will be calculated based on TZS 500,000/= as her monthly salary and not TZS 700,000/= because exhibit C4 is her evidence she cannot deny it now.

Having found that respondent was unfairly terminated, arbitrator ordered the respondent be reinstated without loss of remuneration of TZS 30,800,000/= being 44 months x 700,000 =. It was further ordered that if applicant does not wish to reinstate the respondent, then, she should pay the respondent salaries from date of termination to the date

of the award, together with twelve months salaries, being $12 \times 700,000 = 8,400,000 + 30,800,000 = 39,200,000/=$. As I have found that respondent's salary was TZS 500,000/=, I revise the award and set aside the order and hold that applicant should reinstate the respondent without loss of TZS 22,000,000/= that is 44 months remuneration that is to say, $44 \times 500,000/=$. If applicant is unwilling to reinstate the respondent, then, she should pay a total of TZS 28,000,000/= being respondent's salaries from date of termination to the date of the award, together with twelve months salaries compensation ($44 \times 500,000 + (12 \times 500,000) = \text{TZS } 28,000,000/=$. It is so ordered.

Dated at Dar es Salaam this 9th March 2022.




B.E.K. Mganga
JUDGE