

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

REVISION NO. 210 OF 2021

BETWEEN

JHPIEGO APPLICANT

VERSUS

ODILIA MASSAWE RESPONDENT

JUDGEMENT

S. M. MAGHIMBI, J.

The application is lodged under Section 91(1)(a), (b), 91(2), (b), (c) and 94(1)(b)(i) of the Employment and Labour Relations Act, Cap. 366 [R.E. 2019] ("ELRA"), Rules 24(1), Rule 24(2), (a), (b), (c), (d), (e), (f), Rule 24(3), (a), (b), (c), (d) and Rule 28(1), (a), (b), (c), (d) and (e), of the Labour Court Rules GN. No. 106 of 2007 ("LCR"). In both the notice of application and the Chamber Summons, the applicant prays for the following orders: -

1. That this Honourable Court be pleased to issue an order revising and setting aside the entire award of the Commission for Mediation and Arbitration (Hon. William R, Arbitrator) dated 23rd April, 2021 in respect of labour dispute No.

CMA/DSM/KIN/R.331/15/123 on the ground that the award is legally and factually wrong; it is irrational and illogical.

2. Any other order or relief(s) as the Honourable may deem fit and just in the circumstances.

Before I embark into determination of the application, it is only prudent that the background of the application is narrated. The respondent was employed by the applicant on 01/08/2012 as a Finance Officer. On 12/04/2013, the respondent tendered a 24 hours' notice of resignation in which the applicant alleges to have replied to. That she also informed the applicant of her of the outstanding amount of over TZS. 70,000,000/= that was under her account. On her part the respondents strongly disputed such fact and alleged that after tendering the resignation letter, the applicant has never replied the same to date. The applicant believed that after the respondent tendered her resignation letter, she was no longer her employee hence, on 11/02/2014, 12/02/2014 and 13/02/2014 the applicant published in the Guardian newspaper that the respondent was no longer her employee.

Following such publication, the respondent felt that she was unfairly terminated from employment because the applicant has never accepted her resignation. She hence referred the dispute of unfair

termination (constructive termination) at the Commission for Mediation and Arbitration for Kinondoni ("CMA") and prayed for the employer to accept her resignation letter, certificate of service and payment in lieu of leave. After considering the parties evidence and submissions, the Arbitrator found that the respondent was constructively terminated hence, she was awarded one month salary in lieu of leave, certificate of service and 12 month's salaries as compensation for the alleged unfair termination. Dissatisfied by the CMA's award the applicant filed the present application on the following grounds:-

- i. That the Commission erred in law and fact in holding that the respondent was constructively terminated.
- ii. That the Commission erred in holding that it was unreasonable for the applicant not to reply to the respondent's letter of resignation and instead going straight to publish in the newspaper that the respondent was no longer their employee.

The application proceeded by way of written submissions. Before this court the applicant enjoyed the services of Ms. Blandina Herieth Kihampa, learned Counsel. On the other hand, Mr. Pascal Temba, Personal representative appeared for the respondent.

Arguing in support of the first ground Ms. Kihampa submitted that constructive termination is provided for in our laws under Section 36(a)(iii) of the ELRA and Rule 7(1) of the Employment and Labour Relations (Code of Good Practice) Rules, G.N. No. 42 of 2007 ("the Code"). He submitted that in determining constructive termination, the court has come up with guidelines to consider in assessing constructive termination. She supported her submissions by referring this court to the case of **Yaaqub Ismail Enzron vs Mbaraka Bawaziri Filling Station (Revision 33 of 2018) [2019] TZHCLD 74 (19 September 2019)**, where this Court made reference to the case of **Girango Security Group Vs. Rajabu Masudi Nzige, [2014] LCCD 40** where it was held that: -

"..... an arbitrator or court is required to take into consideration when determining the issue of constructive termination. The questions laid down in the above cases are as follows:

- i. Did the employee intend to bring the employment relationship to an end?*
- ii. Had the working relationship become so unbearable objectively speaking, that the employee could not fulfil his obligation to work?*

- iii. *Did the employer create the intolerable situation?*
- iv. *Was the intolerable situation likely to continue for a period that justified termination of the relationship by the employee?*
- v. *Was the termination of the employment contract the only reasonable option open to the employee?"*

Ms. Kihampa further cited the court of appeal case of **Tanzania Cigarette Company Limited Vs. Hassan Murua (Civil Appeal 17 of 2018) [2019] TZCA 569 (24 June 2019)** where the court widely discussed the concept of constructive termination on the abovementioned principles. She added that in the cited cases, the court held that the onus of proof lies with the employee and that in the case at hand, the respondent did not discharge the burden. Further that the CMA did not apply the guidelines laid down in the cited cases hence arrived to an erroneous decision.

Ms. Kihampa submitted further that Page 17-18 of the proceedings reflects that the respondent testified that the conditions which led to her resignation is the applicant's failure to give her police security while going to the bank notwithstanding the ongoing theft incidents. That the

respondent anticipated that she may be involved in such theft in the future. The counsel argued that the respondent's testimony is insufficient to prove constructive termination.

She submitted further that the respondent presented no tangible proof that she requested for police escort and that the applicant denied her the same. She added that no proof of the on-going theft cases was published in the newspapers. Ms. Kihampa submitted that the alleged theft incidents and security concerns did not come about as a result of the applicant's action and that if at all they were in existence; it was because of the external factors that the applicant had no control over. She went on to submit that in the entire award, the facts presented were not applied to the guidelines for constructive termination. She argued that the Arbitrator did not consider that the applicant was not the perpetrator of the theft cases and whether such cases would continue for the long term so as to warrant resignation and whether resignation was the only logic option.

Ms. Kihampa submitted further that even the respondent's resignation letter did not cite security reasons as the reason for her resignation, arguing that this is an indication that the claim is an afterthought. The counsel then submitted that the respondent resigned

because she was attempting to circumvent the disciplinary processes which had been initiated against her and not otherwise.

Submitting on the second ground, Ms. Kihampa submitted that there is no provision of law that requires an employer to reply to an employee's letter of resignation. She argued that resignation is what can be termed as unilateral act of the employee as it was held in the South African case of **Tristyn Naidoo & Sedayshum Naidu Vs. Standard Bank SA Ltd & SBG Securities (Pty) Ltd, Case No. J1177/19**. She then submitted that resignation becomes effective regardless whether an employer writes a letter accepting the resignation or not as it was also held in the cited case. The counsel submitted that the respondent's actions were unreasonable because her employment came to an end after the lapse of her 24 hours' notice regardless of the applicant's acceptance or not. Ms. Kihampa added that the record shows the applicant accepted the respondent's resignation (exhibit D1), however the applicant neglected to collect the acceptance letter from the applicant's office.

It was further submitted that the applicant did not go straight to publish in the newspaper that the respondent was not her employee. That the respondent resigned on 12/04/2013 whiles the publications

were on 11, 12 and 13 February, 2014. She argued that the CMA failed to consider the time frame from the time of resignation to the time of publications which is over 10 months.

As to the reliefs awarded, Ms. Kihampa submitted that the compensation awarded to the respondent is erroneous because there was no constructive termination in this case; the respondent is not entitled to any compensation. She submitted further that the applicant is the one entitled to payment of respondent's one month salary in lieu of notice. She thus prayed the payment of notice to setoff the alleged leave pay. In conclusion, she urged the court to allow the application and set aside the CMA's award.

In reply, Mr. Temba prayed to adopt the respondent's counter affidavit to form part of his submission. He submitted on the grounds for revision jointly. Starting with Ms. Kihampa submission that the respondent resignation resulted from misappropriation of fund amounting to TZS. 77,705,592/-, his reply is that there is no evidence to prove such allegation. That the respondent had never been informed of the allegation claimed at the CMA. He continued to submit that the applicant's witness (DW1) testified at the CMA that after the respondent's handover ("exhibit AP2") no defects were noticed as

reflected at page 5 of the impugned award. He added that after the handover, the respondent unsuccessfully continued to make follow up of acceptance of her resignation.

Mr. Temba continued to submit that on 11,12,13/02/2014 the respondent was surprised to see a publication in the Guardian and Raia Mwema Newspapers (exhibit AP2) that she was no longer an employee of the applicant. Further that after the publications, the respondent continued to pursue the applicant to avail her with letter of acceptance of resignation but again, she was surprised to receive a letter from Asyla Attorneys informing her to attend a meeting and discuss about the alleged misappropriation of fund. It was further submitted that failure to accept the respondent's resignation prevented her from looking for another job and made her believe she was still the applicant's employee.

Mr. Temba went on to submit that the applicant alluded that they took disciplinary actions against the respondent on the alleged misappropriation of fund however, there is no evidence to prove the same. He added that the case of **Yaaqub Ismail Enzron** (supra) supports the respondent's case that the intolerable working conditions made her resign. He insisted that the respondent resigned for security purposes as she was withdrawing more than TZS. 200,000,000/=

without police escort. He added that other authorities cited by the applicant's counsel are irrelevant to the circumstances of this case. In the upshot Mr. Temba strongly submitted that CMA's award is correct hence this application be dismissed for lack of merits.

After considering the rival submissions of the parties, court records as well as applicable laws I believe the court is called upon to determine the following issues; whether the respondent was constructively terminated, whether the respondent was in any way affected by the applicant's publication of her cessation of employment and the reliefs the parties entitled.

Starting with the first issue as to whether the respondent was constructively terminated. It was Ms. Kihampa's submission that the respondent's testimony at Page 17-18 of the proceedings reflects the conditions which led to the respondent's resignation, which according to her was the applicant's failure to give her police security while going to the bank notwithstanding the on-going theft incidents. The respondent anticipated that she may be involved in such theft in the future to which Ms. Kihampa argued that the respondent's testimony is insufficient to prove constructive termination. In defining the issue of constructive termination, I will start with Section 36(a)(ii) of ELRA which defines

constructive termination to mean a termination by an employee because the employer made continued employment intolerable for the him/her. The circumstances which may establish constructive termination were discussed at length in the case of **Pretoria Society for the Care of the Retarded Vs. Loots [1997] 6 BLLR 721 (LAC)** cited in the case of **Tanzania Cigarette Company Limited Vs. Hassan Marua (supra)** where the South African Labour Appeal Court held as follows:-

"When an employee resigns or terminates the contract as a result of constructive dismissal such an employee is in fact indicating that the situation has become so unbearable that the employee cannot fulfil what is the employee's most important function, namely the work. the employee is in effect saying that he or she would have carried on working indefinitely had the unbearable situation not been created. she does so on the basis that she does not believe that the employer will ever abandon the pattern creating an unbearable work environment. if she is wrong in this assumption and the employer proves that her fears were unfounded then she has not constructively dismissed and her conduct proves that she has in fact resigned.

where she proves the creation of unbearable work environment she is entitled to say that by doing so the employer is repudiating the contract and she has a choice either to stand by the contract or accept the repudiation and the contract comes to an end..."

Another landmark case in establishing the issue of constructive termination is the case of **Eagleton Vs. You Asked Services (Pty) LTD [2008] 111 BLLR 1040 (LC)** which was also cited in the case of **Tanzania Cigarette Company Limited Vs. Hassan Marua** (supra) in which the court set out the requirements for a constructive termination as follows:-

"In order to prove a claim for constructive dismissal, the employee must satisfy the Court that the following three requirements are present:

- i. The employee terminated the contract of employment (the employee has resigned),*
- ii. Continued employment has become intolerable for the employee;*

iii. The employer must have made continued employment intolerable."

In applying the above principles to the case at hand, the respondent strongly alleged that the working environment became unbearable hence she decided to resign from employment. In this application the main reason for the respondent's termination is failure of the applicant to provide her with security specifically, police escort when going to withdraw the applicant's monies. Looking at the record, there is no proof that prior to her resignation the respondent asked for police escort when going to the bank to withdraw money. The allegation of police escort does not transpire in any records before the matter was brought to the CMA. Even in her termination letter the respondent did not indicate that she was resigning from employment due to safety reasons.

The above notwithstanding, if the respondent was really forced to resign from employment, she would have sued the applicant immediately after her resignation. To the contrary, she waited until the applicant published in the newspaper that she was no longer the applicant's employee and rushed to initiate this matter, a pure

afterthought. Given those observations, I am convinced that the pointed circumstances do not amount to constructive termination.

In proving constructive termination, the resigned employee has to prove that termination was the only option available and no any other alternative. None of this situation was established by the respondent during arbitration. At this point, I find the arbitrator to have misapprehended the evidence on and erroneously made a finding that the respondent was constructively terminated.

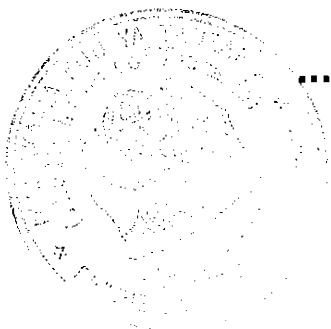
Coming to the second issue whether the respondent was in any way affected by the applicant's publication of her cessation of employment, the respondent alleges that failure to be served with the letter of acceptance of resignation made her believe that she was still the applicant's employee. She also alleged to have affected by the publication. Going through the record, there is letter of acceptance of the resignation letter (exhibit D1) although there is no proof that the same was served to the respondent. The labour laws are silent as to whether it is mandatory for the employer to write letter of acceptance. Under such circumstances it is my strong believe that since the law does not impose such mandatory responsibility to the employer then, in termination of employment by way of resignation, employment

relationship between the parties ends from the date indicated in the resignation letter regardless the fact that the employer has replied to the same or not unless it is stated otherwise. As per the records, the respondent resigned on 12/04/2013 therefore, from that particular date she was no longer the applicant's employee. In the event, further publications in the newspaper by the applicant on 11,12,13/02/2014 were rightly made. Thus, the respondent's allegation that she was terminated in the newspaper lacks legal basis.

Turning to the last issue as to what reliefs are entitled to the parties, having found no fault on the part of the employer, this application is allowed. The award of the CMA is hereby quashed and set aside save for the award of certificate of service.

It is so ordered.

Dated at Dar es Salaam this 19th day of August, 2022.



S.M. MAGHIMBI
JUDGE