

IN THE HIGH COURT OF TANZANIA
LABOUR DIVISION
AT DAR ES SALAAM
LABOUR REVISION NO. 79 OF 2022

(Arising from the decision of the Commission for Mediation and Arbitration of DSM at Temeke dated 11th Day of February 2022 in Labour Dispute No. CMA/DSM//TMK/191/2021)

EDNA MDUBA & UPENDO KISITE APPLICANTS

VERSUS

RAINBOW COLOUR PAINTS RESPONDENT

JUDGEMENT

K. T. R. MTEULE, J

15th September 2022 & 6th October 2022

Aggrieved with the decision of the Commission for Mediation and Arbitration of Dar es Salaam, Temeke [herein after to be referred to as CMA] the applicants have filed this application for revision praying for this Court to be pleased to call and examine the records and Award of the CMA in respect of the Labour Dispute No. CMA/DSM//TMK/191/2021, revise it and set aside the award thereof. The applicant is further paying for costs of this application and any other relief(s) as the Court may deem just and fit to grant.

At this juncture, I find it worth, to offer a brief sequence of facts leading to this application as extracted from CMA record, and the applicants' affidavit. The applicants **Edna Mduba and Upendo Kisite** started

working with the respondent from **1st August 2018**. It is claimed by the applicants that From August 2020, the respondent stopped to pay them salaries. They claim farther that the situation persisted until August 2021 when they decided to resign which they claim to have been constructively terminated due to intolerable working condition created by the respondent.

The matter in the CMA was heard ex parte due to respondents nonappearance. The arbitrator, having heard the applicants on merit, found that there was no letter of resignation tendered by the applicants and held that the said resignation is not proved. The arbitrator concluded that lack of resignation letter means the applicants did not meet the test for constructive termination in accordance with the case of **Eagleton and Others versus You Asked Services (Pty) Limited, 2009, 301 320 LC**. The applicants were aggrieved by the arbitrator's decision and decided to lodge the instant application for revision.

As it was in the CMA, the respondent did not appear in this application for revision. The matter proceeded ex parte by oral submissions. The applicants were represented by Mr. Makunda Mako, personal Representative.

Mr. Mako challenged the arbitrator's view that resignation letter is the test of the breach of contract. Citing the case of **Kobil Tanzania**

Limited vs. Fabrice Ezaovi, Civil Appeal No. 134 of 2017, Court of Appeal of Tanzania, at page 21, he submitted that the test for resignation is the intension of the employee. According to Mr. Mako, it does not necessarily need documentary evidence to prove constructive termination as held by the arbitrator. According to him, non-documentary evidence can sufficiently be proved by oral evidence.

The Applicants are claiming to have been constructively terminated by the applicant. What constitute constructive termination is provided for under Rule 7 (1) and (2) of the Employment and Labour Relations (Code of Good Practice) GN 42 of 2007 which provides;-

"7.1. Where an employer makes employment intolerable which may result to the resignation of the employee that resignation amounts to forced resignation or constructive termination."

This provision provides further:-

(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 deal with, provided that the employee has utilized the availabl mechanism to deal with grievances unless there are good reasons for not doing so.

I have gone through the evidence adduced by the applicants in the CMA. In the evidence, each applicant testified on oath and explained how they worked with the respondent. According to their statements on evidence, the respondent stopped to pay their salaries, something which created intolerable work condition forcing them to stop working which they termed as constructive termination. They explained how they kept reminding the employer to honor their rights by paying their salaries without success. In the applicants' evidence, they both stated that they are not working with the respondent anymore because they left when the respondent stopped to pay them salary for a long period of time.

The arbitrator found no resignation proved. Was the arbitrator right? I am bound to follow the case of **Cobil** cited supra which endorsed with approval the position set out in the case of **Katavi Resort versus Munirah J Rashid [2013]** LCCD 161 which laid down the principles to be considered in constructive termination in terms of **(Rule 7 (1) of GN 42 of 2007)**. The principles were recited in Kobil to be:-

1. *"Intention to end the employment*

2. *Unbearable working relationship.*
3. *Employers' creation of the intolerable situation.*
4. *Continuity of intolerable condition*
5. *The only reasonable option is termination."*

What the applicants testified, which is not challenged by the respondent demonstrate a scenario which meets the above tests. Non payment of salaries for three years by any reasonable apprehension amounts to intolerable situation which is created by the respondent. The situation, having persisted for three years consecutive means there was a long term continuity of the intolerable condition and the applicants could not have any option other than resignation. The arbitrator did not give any weight to this unchallenged evidence of the applicants that they left office due to respondent's failure to pay their salaries. It is apparent from the record that the respondent did not appear in the CMA to counter any evidence adduced by the applicants. I agree with the applicants' representative that there was no need of having resignation letter as evidence after testifying orally that the applicants left the office due to non-payment of salaries, the fact which was not disputed.

Since the respondent was not present to shake the evidence of the applicants, I do not see a reason why the arbitrator failed to believe what was said by the applicants on oath.

Nonpayment of salaries by all standards do not amount to good treatment. In my view it constitutes mistreatment envisaged under **(Rule 7 (2) of the GN 42 of 2007)**. By claiming on oath to have been working without salary payment, in my view, the applicants managed to prove their case since their evidence remained unchallenged by the respondent. On this account, I differ with the arbitrator. The issue as to whether there are sufficient grounds to warrant revision of the CMA award is answered affirmatively.

What about Reliefs? In the CMA Form No. 1, the applicants claimed for a total of 14,800,000.00 which constitutes payment of pending salaries, annual leave of 3 years, social security contributions, 12 months salaries as Compensation for unfair termination, severance pay for having worked with the respondent for 3 years and certificate of service; all these makes a total of TZS 14,800,000.00

Since the respondent did not appear to counter these claims, and since the applicants have stated on oath that they were unfairly terminated constructively, I see no reasons not to grant what they sought, provided they are covered by **Section 40(1) of Cap 366**. Since Social Security payments is not covered by **Section 40(1)**, it cannot be granted.

In the upshot, the application for revision is allowed. Consequently, I revise the decision of the CMA in **Labour Dispute No. CMA/DSM//TMK/191/2021** and set aside the award issued therein. I grant the applicants all the remedies sought in CMA Form No. 1 except the claims of Social Security Contributions. Therefore the Applicants will be paid:-

1. Payment of pending salaries of 3 years.
2. Annual leave of 3 years.
3. 12 months salaries as Compensation for unfair termination.
4. Severance pays.
5. Certificate of service.

Dated at Dar es Salaam this 6th Day of October 2022



KATARINA REVOCATI MTEULE

JUDGE

6/10/2022