IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

LABOUR REVISION NO. 393 OF 2022

(From the Ruling of the Commission for Mediation and Arbitration of Dar es salaam at Kinondoni dated 19th day of March 2018 in Labour Dispute No. CMA/DSM/KIN/60/2020/143/21)
(By Msina: Arbitrator)

AYUBU ALPHONCE RUBALE.....APPLICANT

VERSUS

GLOBAL MEDIA SOLUTIONS LTD.....RESPONDENT

JUDGMENT

K. T. R. MTEULE, J.

06thFebruary, 2023 & 28th February, 2023

This is an application for revision seeking for this court to call and revise the proceedings from the Commission for Mediation and Arbitration in **Labour Dispute No. CMA/DSM/KIN/60/2020/143/21**. The application further seeks for this court to quash the award issued therein, dated 13th October 2022.

From the record of CMA, the affidavit and counter affidavit of the parties and the submission in support of the Application, it appears that the Applicant was employed by the Respondent as a Security Officer. He lodged the aforementioned labour dispute in the CMA

claiming to have been unfairly terminated from his employment by the Respondent on 18th November 2019.

The respondent denied having terminated the applicant and alleged abscondment by the applicant after having initiated a criminal case against another employee.

Mediation having failed, the arbitration was conducted, and the award was issued in respondent's favor. The arbitrator found the dispute to have been prematurely lodged due to lack of evidence of termination and dismissed the application. The Applicant being dissatisfied with the CMA award preferred the present application for revision.

The application was argued by a way of written submissions, whereby the applicant appeared in person while respondent was represented, by Ms. Lightness Orio HR Officer of the Respondent. Their submissions approached 4 legal issues which were framed by the Applicant. The issues are: -

i) That the Honourable Arbitrator erred in law and fact by deciding that there was no termination, and the dispute is premature.

ii) That the Honourable Arbitrator erred in law and fact for failure to recognize that the respondent was terminated without being availed a chance to be heard.

iii) That the Honourable Arbitrator erred in law and fact for holding that the applicant failed to prove that he was terminated even though the respondent was the one who ordered to bring back the uniform to the office.

iv) That the Honourable Arbitrator improperly procured the award.

Starting with the ground that the application was prematurely filed for having no termination of the applicant's employment, the applicant submitted that he was unfairly terminated from employment, after the fight between him and a fellow employee one Engineer Daudi Omary Bushiri and this was proved by the summons to attend at the police station for assault the fact which is not disputed. According to the applicant, evidence was given in the CMA that he was terminated when they were at the Police Station. He stated that this piece of evidence was not challenged by the respondent's witness and therefore this proves that there was a problem between the Respondent and the Applicant. According to him the respondent's witness DW1 was not at the police station when

the respondent terminated him. He further added that while at the police station the accused one Daudi Omary Bushiri was under arrest and because the respondent was not happy with the whole process of filling a criminal case, he decided to terminate his employment.

On **second** ground that the Honorable arbitrator erred in law and fact for failure to recognize that the Respondent was terminated without being availed a chance to be head, the applicant submitted that during the hearing of the case the respondent's witness stated that the applicant terminated himself, but she did not produce any evidence on which procedure was followed to prove that the applicant terminated himself from employment. He stated that the respondent failed to disclose as to why the uniform was in her possession at the time of hearing of this case, as was testified by the applicant. He further added that the law provides for the procedures to be followed when the employee absconds from work, as per **Section 37 (2) of the Employment and Labour Relations Act, Cap 366 R.E 2019** which directs that, no termination is permissible in law if it does not follow a fair procedure. He further referred to **Article 7 of the ILO Termination of Employment Convection, 158 of 1982** where the said principle is rooted. On that basis he is of the view that he is entitled to be compensated as per **Section 40**

(1) (c) of the Employment and Labour Relations Act, Cap 366 R.E 2019.

On the **third** ground that the Honorable arbitrator erred in law and fact in holding that the applicant failed to prove that he was terminated despite the fact that the respondent was the one who ordered him to bring the uniform back to the office. He stated that on the next day after the termination, the applicant reported to the office and he was told to write a resignation letter, but he refused and this testimony was never challenged by the respondent in the CMA, but still the arbitrator went ahead to rule out that the applicant was never terminated by the respondent.

On fifth ground as to whether the award was properly procured Mr. Rubale submitted that for the termination to be fair, one has to give reason for the termination, as provided under the **Section 37(1)(a)(b) and (c) of the Employment and Labour Relations Act, Cap 366 R.E 2019.** According to him, the award of the CMA lacks some legal requirements as the respondent failed to prove that there was a fair reason for the termination.

Opposing the application the respondent referred to page 4 and 5 of the award and submitted that the pages show that the applicant failed to prove his allegation regarding unfair termination and

therefore the trial commission was right in holding that the matter was prematurely filed.

In rejoinder the applicant reiterated his submission in chief but emphasized that since his uniform was taken by the Human Resources Officer, according to him it was enough evidence to justify termination.

Having gone through the parties' submissions and their sworn statements together with the record of the CMA, I am inclined to address two issues. The first issue is **whether the applicant has adduced sufficient grounds for this Court to revise and set aside the CMA award** and secondly, **to what reliefs are parties entitled**?

In addressing the first issue, all the grounds of revision raised by the applicant will be considered all together. The applicant raised an issue as to **whether the matter was prematurely filed for having no termination of applicant's employment**. The Applicant averred that the respondent's allegation regarding his abscondment lacks basis on the reason that no evidence was adduced by the respondent to prove that procedures were followed to deal with the abscondment. He added that the respondent failed to disclose as to

why his uniform was in her possession at the time of hearing of this case. He is of the view that his employment was terminated.

On the other hand, the Respondent maintained that the applicant failed to prove his allegation regarding unfair termination. in her view the trial commission was right in holding that the matter was prematurely filed.

according to the record of the CMA, it was testified by the applicant that on 18th November 2019 while at the police station for an assault incident, the applicant told him not to return to the office because of what he did to report the criminal offence against a fellow employee. This evidence was not countered. DW1 did not directly challenge this evidence apart from stating that the applicant absconded from employment. According to the PW1, DW1 was not at the police station where the applicant was allegedly terminated orally.

To ascertain if the applicant was not terminated and if the matter was filed prematurely, I have to visit the provision of law guiding filing of Labour dispute. Lodgment of a claim in the CMA is governed by **Rule 10 of the Labour Institutions (Mediation and Arbitration) Rules 2007 (G.N No. 64 of 2007)** which required a complaint to be filed within 30 days from the date of termination or from when the final decision in terminating employment is made. This means

termination or final decision to terminate shall be in existence for a complaint to be lodged.

In this matter, the CMA record, especially respondents opening statement reveals that from 18th November 2019 when the incident of assault occurred and reported to the police till 20th January 2020 when the dispute was filed at CMA the applicant did not attend to his work place. No evidence was adduced to show if the applicant continued to enjoy his remuneration from 18th November 2019 to 20th January 2020 when CMA Form No. 1 was received in the CMA. As well no disciplinary action was taken to address any applicant's abscondment from the work. According to **Section 15(5) Employment and Labour Relation Act, Cap 366 R.E 2019**, it is the duty of an employer to keep employment record for five years after termination and since the employer is the keeper of the records, the law, **Section 39 of the Employment and Labour Relation Act, Cap 366 R.E 2019** placed a burden of proof upon the employer when it comes to issues of unfair termination.

Since, there is no evidence to indicate that the applicant's absence from work from the date of police incident on 18th November 2019 to 20th January 2020 when the matter in the CMA was lodged was actually addressed by disciplinary measures, it means the respondent

knew the whereabout of the applicant. This indicates a possibility that the applicant was orally terminated as he pleads. In addition, there is no prove that the applicant received any salary after that incident. It was the duty of the employer to disprove this allegation in the CMA by explaining any disciplinary action held to deal with abscondment or evidence of payment of salary.

The mere words of the respondent pleading that she had never terminated applicant's employment cannot hold water without any supporting evidence such as disciplinary action for the alleged abscondment. **Guidelines 1 of Guidelines for Disciplinary, Incapacity and Incompatibility Policy and Procedures of Employment and Labour Relations (Code of Good Practice) G.N No. 42 of 2007** requires absence of an employee from work for more than five days without permission, to be addressed by a disciplinary action as it fall under offences which may constitute serious misconduct leading to termination of an employee. From the above analysis, I agree with the applicant that the respondent did not prove that she did not terminate the applicant orally.

I have taken note of the case **of C.R.J.E Co. Ltd versus Maneno Ndalije and Another, Lab. Div. Revision No. 205 of 2015** cited by the Respondent. It is true, this Court in that case held that where

the respondent denies to have terminated the applicant, then it is upon the applicant to prove the termination. In this matter, I am satisfied that the applicant proved in the CMA to have been terminated orally at least to the balance of probability. Again, there are other circumstances such as failure to take disciplinary action against the alleged abscondence and failure to bring evidence to challenge the evidence of oral termination when parties were at the police station. DW1 did not comment on what was said by the applicant regarding oral termination while at police station.

I therefore agree with the applicant that the arbitrator erred in finding that no termination, and in holding that the dispute is premature.

The above conclusion confirms that since the termination was s casual as no evidence to indicate that there was any reason assigned by the employer in terminating the applicant, this leads to another conclusion that the applicant was terminated without a fair reason and without any compliance with the procedures.

With regards to the issue of reliefs to the parties, in the CMA Form No. 1 the applicant prayed for 12 months remuneration as compensation TZS 3,600,000.00, one month's salary in lieu of notice

TZS 300,000, Leave TZS 300,000.00, One month salary of November 2019 TZS 300,000 and certificate of service.

It is on record that the applicant was employed under fixed term contract of ten months which was supposed to end on 31st December 2019 as per **Exhibit D-1** (employment contract). He was terminated on 18th November 2019. This means there were two months remaining period before the lapse of the contract term. It is an established principle that for a fixed term contract, the foreseeable relief to redress unfair termination is the months remaining from the contract. (See **Good Samaritan Vs. Joseph Robert Savari Munthu**, Revision No. 165/2011 High Court, Labour Division Dar es salaam (unreported)). In this case, the Court held: -

> *"When an employer terminates a fixed term contract, the loss of salary by employee of the remaining period of the unexpired term is a direct foreseeable and reasonable consequence of the employer's wrongful action...."*

From the above authority the entitlement to the applicant is two months' salaries which remain from his employment contract **(Exhibit D-1).** All other claims in the CMA Form No. 1 in my view

are valid and rightful entitlement to the applicant except the quantum. According to **Exhibit D-1** which is the employment contract, the applicant's remuneration was TZS 230,000.00 per month.

The above analysis confirms the first issue that the applicant has sufficiently established grounds which may warrant this court to interfere with the decision of the CMA by a way of revision.

On that basis this Court finds that the application has merit, and therefore the application is allowed. The CMA award is hereby quashed and set aside. The applicant is entitled to 2 months remuneration as compensation which is **TZS 460,000.00**, one month's salary in lieu of notice which is **TZS 230,000.00**, Leave payment which is **TZS 230,000.00**, One month salary of November 2019 which is **TZS 230,000.00** and certificate of service. Each party shall bear its sown cost. It is so ordered.

Dated at Dar es Salaam this 28th day of February 2023.

KATARINA REVOCATI MTEULE

JUDGE

28/02/2023