IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

LABOUR REVISION NO. 330 OF 2022

(Arising from the Commission for Mediation and Arbitration of Dar es Salaam at Kinondoni in Labour Dispute No. CMA/DSM/KIN/702/20/306)

DONATHA CRISPIN KIIZA & JUDITH ONESMO JOEL.......... APPLICANTS

VERSUS

VILLAGE SUPERMARKET LTD.. RESPONDENT

JUDGMENT

K.T.R, Mteule, J

8th February, 2023 & 01st March, 2023

This Application for revision arises from the award of the Commission for Mediation and Arbitration of Dar es Salaam, Kinondoni in Labour Dispute No. CMA/DSM/KIN/702/20/306. Vide CMA Form No. 1, the Applicants were claiming a total of **TZS 6,705,383.00,** alleging to have been unfairly terminated from their employment.

According to the CMA record, the applicants were employed by the Respondent as cashiers in various dates where Donatha Crispin was being paid a monthly salary of TZS 225,000.00 while Judith Onesmo Joel a monthly salary of TZS 210,000.00.

In the CMA, the Applicants complained to have been verbally terminated by the Respondent on 12/9/2020 without a reason and without compliance with any procedure. On the other hand, while denying to

have terminated the Applicants, the respondent explained incidences in which the applicants refused service of various documents including the letter to show cause why they refused to comply with Employer's instruction, and invitation to disciplinary meeting. According to the respondent in the CMA, after refusing receipt of disciplinary correspondences, on 8th September 2020, a disciplinary meeting was held in absence of the respondent and 15th September 2020, she received CMA Form No. I. He was of the view that the Labour Dispute was prematurely lodged in the CMA because there was no termination yet.

In the CMA, the arbitrator found that there was no termination of the applicants' employment and dismissed the applicant's claims. The dismissal aggrieved the applicants who preferred this application for revision.

Along with this application an affidavit jointly sworn by the applicants was lodged. The affidavit narrated the facts of the matter. It contains 3 grounds of revision to wit:-

1) That the CMA errored to hold that the applicants were not terminated
2) That the CMA errored in holding that the application was filed prematurely

3) That the CMA did not properly evaluate the evidence before it.

The application was argued by a way of written submissions. The applicant was represented by Mr. Shalom Msaki, Advocate while the respondent was represented by George Lupindo, the Applicants Human Resource Officer.

Mr. Msaki submitted that on 29th August 2020 the applicants were asked by their Manager one Basil to work overtime because of the sickness of the cashier on duty. According to Mr. Msaki, the Applicants refused to work overtime basing on reason that it was contrary to their employment contract **(exhibit D-1).**

He continued to state that on 12th September 2020 the Applicants were told that they were terminated from their employment and they were told to hand over all the cash and leave the premises of the respondent that the applicants decided to refer the dispute into the CMA where a decision was delivered in favor of the respondent on reason that the applicants were not terminated but rather absconded from work.

Submitting as to whether the applicants were terminated or absconded from duty, Mr. Msaki stated that the applicants were verbally dismissed from work without being given any documentation, afforded right to hearing and without being given any terminal benefits as provided by

the law. He challenged the arbitrator's holding that the applicants absconded while they were denied access to the office premises.

Mr. Msaki cited the case of **Frank E. Mukano and Another vs. Bansal Steel Rolling Mills Ltd Revision No. 7 of 2019**, (unreported) whereby Hon. Robert J, at page 7 stated that if the employer denied the employee access to the work premise, the same employer cannot claim that the said employee absconded from employment. According to him, the law provides that, for an employee to be held accountable with abscondment such employee must be absent for more than 5 consecutive days but the applicants were summarily terminated on 12th September 2020 and on 16th September 2020 they filed their case before the CMA and therefore they were absent for 4 days only and had already referred their grievances before the Commission. Therefore, in his view, the CMA in holding that the applicants absconded while they did not meet the 5 days threshold.

Addressing the 3rd issue as to whether the respondent adhered to fair procedures and if the applicants are entitled to receive benefit from the respondent, Mr. Msaki stated that, even if the applicant truly absconded, then the proper legal procedures were to be taken by the employer to address the situation and further if the CMA was in the same view then they ought to have mandated proper procedures to be applied so as to

protect the applicants and enjoy their terminal benefits and proper termination.

Mr. Msaki cited the case of **JC. Gear Exprocom AB (T) Ltd vs. Jumbe Karala and Another, Labour Revision No. 4 of 2019** (unreported) where Hon. Tiganga J was of the view that for abscondment to be held as ground for termination, it must be established that the employee was truly not at work for grounds which are not acceptable and proper procedure were followed. According to him, procedure was never adhered to and that the respondent knew exactly the reason why the applicants were not at work for four days and it was because they were summarily terminated. He wondered on how the CMA wanted the applicants to go back to work when the matter was in CMA.

Mr. Msaki submitted further that, the respondent stopped to pay the applicant's salary on the same month of September, and this supports the contention that the applicants were terminated. He finally asked this Court to reach a fair decision on this ground so as to set a standard to deter employers from abusing the charge of abscondment as a defense for summary termination complaints.

Lastly, on 2nd ground, as to whether the termination was on fair reason and fair procedure, Mr. Msaki reiterated the submission that if the

ground was abscondment or termination; then the proper room for termination provided under **Rule 9 and 13 of the G.N No. 42 of 2007** ought to have been followed where the allegations were to be heard and parties given chance to give evidence. According to him, this was not done during the termination and in the CMA. He referred to the CMA award where the issue as to whether the respondent absconded was not framed but raised by the arbitrator *suo moto* who answered it without having it argued by the parties. In his view, this breached the procedure of litigation which requires parties to be confirmed within the framed issues. In light of the above submission and laws, he prayed for the Court to set aside the decision of the CMA and decide it in favor of the applicant's prayers contained in CMA Form No. 1 lodged in the CMA.

In reply, Mr. George Lupindo, consolidated all the applicants' grounds for revisions and argued them all together. He submitted that both applicants were not terminated but absconded by stopping to attend work since 12th September 2020 without any acceptable reason or permission. He added that they absconded after refusing to be served with **exhibit D-2 & D-5** which were letters requiring them to submit written explanation as to why they disobeyed lawful instruction and notice to attend disciplinary hearing. He stated that the applicants denied to attend disciplinary hearing and instead they both on their own

accord made a rush to invoke intervention of the CMA before the internal proceedings were completed. According to him, the complaint before the CMA was premature because the Management had not concluded the determination of the complaint against the applicant.

He submitted that failure to report on duty for more than 5 days constitute an offence which needs termination of employment as provided under the **Labour Relations Code of Good Practice G.N No. 42 of 2007 Guidelines 9(1) of the Guidelines of Disciplinary, Incapacity and Incompatibility of Policy and Procedures**.

It is Mr. Lukindo's submission that the respondent proved before the CMA that he did not terminate the applicants by tendering **exhibit D3** which is the Disciplinary hearing forms and **exhibit D4** which is print out of attendance. He cited the case of **Edson Ndibalema vs. The Atriums Hotel Application Revision No. 276 of 2022, High Court of Tanzania, Labour Division at pages 5 and 6** Hon. B.E.K.Mganga, J where in a situation where the employees refused notice to disciplinary hearing and rush to CMA, the Court found it unacceptable.

Mr. Lukindo submitted further that the applicants have failed to substantiate all the allegations including that of termination as they have not been able to provide any documentary evidence to show that they were terminated. He further cited **Said Seleman and 13 other vs. A**

one Product and Bottlers Ltd, Revision No. 890 of 2018, where the Court held that the matter was premature before the Commission for having been lodged before the completion of disciplinary hearing (page 4).

Mr. Lukindo prayed for this Court to dismiss the application for being devoid of merit and uphold the CMA award. I humbly submit.

Mr. Msaki made a rejoinder. He challenged the assertion of abscondment with argument that there could be no abscondment for only 4 days absence and during the pendence of the arbitration process in the CMA.

Mr. Msaki considered the disciplinary process as an afterthought to cover the unfair termination. He added that the said disciplinary hearing was only for insubordination and not for abscondment. He questioned why the applicant's salaries were not paid if not terminated. Other contents of rejoinder will also be considered in determining this matter.

Having considered the submissions of the parties, the issue before me is **whether the applicants have established sufficient cause to warrant revision and setting aside of the CMA award**.

Before embarking into the issues raised in the affidavit, I feel obliged to respond to Mr. Msaki's assertion that the arbitrator framed the issue of abscondment *suo moto* and decided it without affording parties

opportunity to respond. In my view this issue falls under the issue as to whether the applicants were terminated from employment by the respondent. From the record I could not see any reason to have the issue of abscondance framed separately, as it is covered by the issue as to whether the applicants were terminated. I therefore find this assertion baseless.

The Arbitrator found that there was no termination of the applicant's employment and the dispute was lodged prematurely. The Arbitrator was guided by the evidence of the respondent's witness DW1 who stated that the applicants refused to work overtime and refused to receive a letter of show cause and the invitation to the disciplinary committee. All these correspondences were tendered in the CMA as exhibits. DW1 told the court that after the applicants' refusal to receive all the documents, the disciplinary hearing proceeded in their absence. The arbitrator found that in this kind of situation, the applicants had a duty to prove that they were terminated and that the said duty was not discharged.

I have also considered the entire scenario. It is apparent that the respondent's denial to have terminated the applicants was supported by evidence and exhibits which indicated that the applicants were facing a disciplinary process before lodging the CMA complaint. Even the

evidence of the applicants in the CMA did not deny this assertion. They admitted to have been served with a letter concerning disciplinary proceedings but they refused to accept it and went to lodge a complaint in the CMA. The case of **C.R.J.E Co. Ltd versus Maneno Ndalije & Others, Labour Division, Revision No. 205 of 2015, (unreported)** which was also cited by the arbitrator brings relevance in this matter. In this case the court held that the applicants had a duty to prove that the termination actually took place in circumstances where the respondent denies to have terminated them. I subscribe to the position of the arbitrator.

The arbitrator was further guided by the case of **Said Seleman and 13 Others versus A- One Product & Bottlers Ltd, Revision No. 890/2018, High Court Labour Division** where this court, in a similar situation, found the matter to have been lodged in the CMA prematurely.

In my view, the commission was correct to find that there is no proof of termination of the applicant's employment and that the applicants sent their complaint in the CMA prematurely. I see that the arbitrator properly evaluated the evidence on record. I therefore subscribe the arbitrator's position. The issue as to whether there are sufficient reasons

adduced by the applicants to warrant revision and setting aside of the matter is therefore answered negatively.

From the above analysis I find this application for revision devoid of merit. The application is dismissed, and the arbitrator's award is upheld. It is so ordered. Each party to take care of its own costs.

Dated at Dar Es Salaam this 1st March 2023

KATARINA REVOCATI MTEULE

JUDGE

01/03/2023

Labour Court