

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

REVISION NO. 261 OF 2022

*(Arising from the decision of the Commission for Mediation and Arbitration at
Ilala in REF: CMA/DSM/ILA/R.550/17/833)*

EXIM BANK (T) LTD APPLICANT

VERSUS

AGNESS TEMBA RESPONDENT

JUDGEMENT

S. M. MAGHIMBI, J:

This 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 G.N. No. 106 of 2007 ("LCR") and any other enabling provisions of the law. The applicant prayed for the following orders:

1. This Honourable Court be pleased to call for, examine and revise the proceedings, ruling, decision and orders of the Commission for Mediation and Arbitration ("CMA") in Labour Dispute No. CMA/DSM/ILA/R.550/17/833.

2. That this honourable court be pleased to make any other or further orders as it may be just and convenient in the circumstances of this case.

The application is supported by an affidavit of Mr. Edmund Mwasaga, the head of legal unit of the applicant; an affidavit deposed on 11th day of August, 2022. On her part, the respondent strongly challenged the application through the counter affidavit sworn by the respondent herself.

In the affidavit of Mr. Mwasaga, the applicant raised the following issues: -

- i. Whether the Arbitrator was right to uphold the Respondent's notion that she should not live far from the children who were residing in Dar es Salaam could amount to constructive termination without regarding the fact that the applicant had a policy of updating the employees personal details or information.
- ii. Whether the Arbitrator was right to point out that failure of the Respondent to submit the investigation report before the commission was not an issue as a result associate it with the

constructive termination without putting in mind the rules of granting bail.

- iii. Whether the Arbitrator misdirected herself by holding that the Respondent was resigned based on the employers harsh antagonistic and hostile conduct and was ascribed to some form of coercion and the prospect of continued employment must be unbearable, which at all was not proved by the Respondent
- iv. Whether the Arbitrator erred in law by awarding to the Respondent a 24 months' compensation for constructive termination without advancing good plausible reasons.

Before going into the merits or otherwise of this application, brief background of the matter is narrated. The Respondent was employed by the applicant since 17th October 2007 as a Banking Officer II. On the 20th December, 2011 she was promoted to the position of Manager-Customer Service and operations at Namanga Branch Dar es Salaam. However, on the 20th Jul, 2015, the Applicant suspended the Respondent's employment pending investigation on allegations of involvement in a fraudulent transaction which took place at Namanga Branch. The respondent was alleged to have acted in collaboration with some other Bank officers at the headquarters while serving as the

assistant branch manager. On 13th March, 2017, the Applicant issued a reinstatement letter to the Respondent and she was reinstated to resume work from suspension in the same role as a Manager Customer Service and operations at Shinyanga Branch.

On 15th March 2017, the Applicant replied the Respondent's letter dated 13th March 2017 regarding reinstatement from suspension period which the Respondent requested to be given two weeks to enable her to move from her work station. The Applicant gave her 12 days instead of two weeks for her preparations. The Respondent was transferred by the Applicant to Shinyanga branch due to the business needs but also due to the fact that the Applicant had no vacancy fitting the Respondent's position at Namanga Branch in Dar es Salaam. The Applicant then paid all the transport allowance within 14 days after the Respondent was transferred to Shinyanga. Subsequently on the 28th April, 2017 the Respondent issued a 24 hours' notice of her resignation to the Applicant's Head Offices at Dar es Salaam, for purported reason that her resignation was caused by subsequent intolerable, un-conducive working environment and circumstance beyond her control which forced her to resign.

Following her resignation, the Respondent successfully referred a dispute before the CMA. She was subsequently awarded a total of Tshs. 39,266,427/= being compensation of 24 months' salary, annual leave, severance pay and one month's salary in lieu of notice. Aggrieved by the award of the CMA, the applicant has preferred this appeal.

The application proceeded by way of written submissions. Before this court the applicant was represented by Advocate Prisca Nchimbi whereas the respondent was represented by advocate Maunda Raphael.

Submitting on the first issue, Ms. Nchimbi submitted that the respondent decided to terminate her employment voluntarily because the employer did not create intolerable conditions as stated by the Arbitrator at page 5 of the impugned award. That the respondent was supposed to tender evidence to prove the elements of constructive termination as stated in the case of **Kobil Tanzania Limited vs Fabrice Ezaovi (Civil Appeal 134 of 2017) [2021] TZCA 477 (16 September 2021)**. The counsel insisted that the burden of proving constructive termination was on the respondent as it was held in the case of **Girango Security Group Vs. Rajabu Masudi Nzige, Lab. Div. DSM Revision No. 164 of 2013**.

As to the second issue, Ms. Nchimbi submitted pointed to the evidence of PW1 who testified that she was required to appear at the police station every week and that the Arbitrator mistakenly put the blame to the applicant who could not interfere with the police process or the rules of granting bail. Ms. Nchimbi submitted further that it was well explained by DW2 that the transfer of the respondent to Shinyanga was due to the fact that her position was already covered in Dar es salaam and the available position was only at Shinyanga or Mtwara. She added that the issue of failure to submit the investigation report before the CMA and the only regard being the respondent was to appear every month before the police station was a total misdirection on the Arbitrator because the applicant could not interfere with the rules of granting bail. She insisted that the respondent did not prove constructive termination.

Regarding the third issue Ms. Nchimbi reiterated her submission in the first and the second issues. Turning to the last issue, Ms. Nchimbi submitted that the award of compensation must be exercised judiciously. She argued that in the case at hand, the Arbitrator failed to give any reasonable ground for the award of 24 months' salaries. To support her submissions, she referred the court to the case of

Veneranda Maro & Another vs Arusha International Conference Center (Civil Appeal 322 of 2020) [2022] TZCA 37 (18 February 2022) and the provision of rule 32(5) of the Labour Institution (Mediation and Arbitration Guidelines) Rules, G.N 67 of 2007. In conclusion she prayed that the court quash and set aside the CMA's award.

In reply to the first issue, Ms. Raphael defined constructive termination in reference to a number of cases including the landmark case of **Girango Security Group (supra)**. She submitted that the respondent proved the constructive termination based on the following reasons;

- (i) The transfer of work to Shinyanga which she did not refuse the offer but her situation was based on the family she has in Dar es salaam, she has two children who were underage, they were still under her care but she was paid her transfer allowance only while she has a family.
- (ii) That due to the allegations which led to her suspension, she had a criminal case which was before the police and she was required to report every month to the station, and the

applicant promised her to inform the police to drop charges the promise which was never maintained by the applicant.

- (iii) That the Applicant's officer who was PW2 before CMA threatened to cancel bail before the police station

The counsel insisted that all the elements established in the cited case of **Kobil Tanzania Limited** (supra) were proved in this case.

As to the second issue was submitted that the applicant failed to avail the respondent with investigation report pursuant to Rule 13(1) of the Employment and Labour Relations (Code of Good Practice) Rules, GN. 42 of 2007 ("the Code"). to support her submission, the counsel also cited the case of **Severo Mutegeki and Another v. Mamlaka ya Maji Safi na Usafi wa Mazingira Mjini Dodoma (DUWASA), Civil Appeal No. 343 of 2019**, Court of Appeal of Tanzania at Dodoma.

Coming to the third issue, Ms. Raphael reiterated her submission on the first issue. And for the last issue, Ms. Raphael's referred the court to rule 32(5) of the Labour Institution (Mediation and Arbitration Guidelines) Rules, G.N 67 of 2007 and firmly submitted that the Arbitrator assigned reasons for awarding 24 months as stated at page 9-11 of the impugned award. In the upshot the counsel maintained that

the respondent was fairly awarded and prayed for the dismissal of the application. In rejoinder Ms. Nchimbi reiterated her submission in chief.

After considering the parties submissions and the issues raised by the parties, the main issue for determination is whether the respondent's resignation amounts to constructive termination. As rightly addressed by the trial Arbitrator, constructive termination is defined under section 36(a)(ii) of the ELRA to mean termination by the employee because the employer made continued employment intolerable for the employee. The meaning is also reflected under Rule 7(1) of the Code where it is provided that if the employer makes the employment intolerable which results to the resignation of the employee, that resignation amount to forced resignation or constructive termination. In the application at hand, the applicant sternly argues that the respondent did not prove the alleged constructive termination as found by the Arbitrator and instead, argued Ms. Nchimbi, the respondent decided to terminate her employment voluntarily because. She further submitted that the requirements for constructive termination as they are stated in the case of **Kobil Tanzania Limited** (supra) were not proved in this case. Looking at the referred case of **Kobil Tanzania**

Limited (supra), the following questions were set to be determined in a claim of constructive termination:-

- 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?"*

In the instant matter, looking at the respondent's resignation letter (exhibit X5) she mentioned the following reasons which necessitated her resignation from employment:-

- i. That, she was suspended from her employment from July 2015 to March 2017 when the employer decided to transfer her to Shinyanga to continue with her work.

- ii. That prior to the said transfer, the employer conducted hearing which was adjourned due to incomplete evidence hence the hearing did not finish.
- iii. That, besides of non-completion of the evidence, the employer rendered the decision of giving her final warning and letter of transferring her to Shinyanga.
- iv. That, despite being aware that the respondent is married with children, the employer denied to facilitate transport of her children to her new station hence causing hard time of her children who were under age.
- v. That, the employer did not withdraw his complaint at police thus, causing her to report to police every month at Dar es salaam.

On her part, the applicant, after being served with the respondent's resignation letter he did not bother to respond to any of her allegation levelled in the termination letter instead, they demanded the respondent to pay three months basic salary in lieu of notice of termination as explained in the letter titled salary in lieu of notice (Exhibit EX6). At this point it is pertinent to analyse the stated reasons for resignation altogether and see if they amount to constructive

termination under Rule 7(2)(b) of the Code where it provides reasons to justify a forced resignation to include a situation where an employee has been unfairly dealt with. Although the sub-rule (2)(b) of Rule 7 of the Code has a proviso which requires an employee to show that she has utilized the available mechanisms to deal with grievances, the sub-rule also has a leeway to exempt the exhaustion of available remedies in case where there are good reasons for not doing so.

An analysis of the record shows that this matter originates from the allegation of gross negligence levelled against the respondent. It was alleged that the respondent, while serving the Bank as Manager of Customer Service and Operations at Namanga Branch she authorised 3 TISS transaction that were submitted by BC Mining at Namanga Branch for payment to TRA. It was further alleged that the respondent failed to exercise due care while executing the payment authorization, exposing the bank to monetary loss. On the basis of the said allegations the matter respondent was suspended from work and further summoned before a disciplinary hearing committee. The hearing was held on 04/09/2015 where the Committee came with the decision that additional evidence was needed to be able to decide the matter thus, the hearing was adjourned to unspecified time.

From there, the record is silent as to what transpired after the adjournment of the disciplinary hearing until 13/03/2017 when the respondent was served with the reinstatement letter (Exhibit EX4) which transferred her to Shinyanga branch. Therefore, on the basis of the evidence on record, it is convincing that the matter was also reported to police for further investigation since the applicant also did not dispute such fact. However, as rightly found by the Arbitrator, the respondent was not served with any report of the further investigation.

The applicant further claimed that they paid the respondent his full transfer allowance as entitled. However, there is no proof of the same. Furthermore, the applicant did not dispute the fact that the respondent was required to report to police station every month concerning the same allegation which put her out of her employment for almost two years. Therefore, being required to report from Shinyanga to Dar es salaam police station every month while reinstated on employment, in my strong view, created some unbearable conditions to the respondent. It is obvious that the matter at the police station was initiated by the applicant therefore, if he decided to reinstate the applicant to her employment, he was supposed to make her working environment suitable without any fear or anxiety. Even her transfer to

Shinyanga should have been subject to the closure of the case at Dar es salaam police station. It could not be, by any means, convenient for the respondent to work at Shinyanga and report at Dar es salaam police station every month on her own costs. Thus, the employer made her working environment intolerable.

At this point, it is to the satisfaction of this court that the circumstances established in the case of **Kobil Tanzania Limited (supra)** were proved in this case. Considering the fact that the respondent reported to Shinyanga branch where she was transferred to, it is my further finding that she had no intention to resign. As stated above, investigation in this matter was conducted for almost two years without any findings in such situation any employee would have complained of such working environment. Further report to Dar-es-salaam from Shinyanga is also another proof of intolerable environment for the employee. On those findings, I join hands with the Arbitrator that there was constructive termination in this case hence the decision of the CMA is upheld.

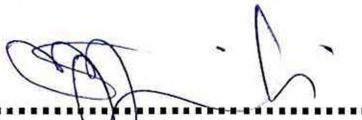
Coming to the last issue as to parties reliefs, on the basis of the above findings I find no justifiable reason to fault the Arbitrator's award. On her CMA F1 the respondent prayed for the reliefs awarded by the

Arbitrator hence, I find the same were fairly awarded to her. I have considered the applicant's allegation that the Arbitrator did not state reason for his decision. Indeed, the Arbitrator or court is supposed to advance reasons for the decision to award in excess or below the stipulated amount as it was also held in the case of **Veneranda Maro & Another vs Arusha International Conference Center (supra)** and the same were not advanced in the matter at hand. Nevertheless, in the circumstances of this case where the respondent's allegation has not been ended for almost two years which also affects her employment records, I find the award of 24 months as prayed were justifiable for the circumstance.

In the result I find the present application has no merit and it is dismissed accordingly. The CMA's award is hereby upheld. It is so ordered.

Dated at Dar es Salaam this 10th day of February, 2023.




S.M. MAGHIMBI
JUDGE