

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

REVISION APPLICATION NO. 08 OF 2023

*(Arising from an Award issued on 16/12/2022 by Hon. Lucia C.C, Arbitrator in Labour dispute No.
CMA/DSM/KIN/42/14/163/21 at Kinondoni)*

**PROTEA THEATRE SQUARE LIMITED t/a PROTEA
HOTEL OYSTERBAY APPLICANT**

VERSUS

JANE MWIKWABE RESPONDENT

JUDGMENT

*Date of last order: 08/05/2023
Date of Judgment: 29/05/2023*

B. E. K. Mganga, J.

Brief facts of this application are that, in 1998 Protea Theatre Square Limited t/a Protea Hotel Oysterbay, the abovementioned applicant employed Jane Mwikwabe, the herein respondent, as Cook. The two continued to enjoy their employment relationship up to 8th January 2014 when the said employment relationship became bitter. With that state of affairs, respondent filed Labour dispute No. CMA/DSM/KIN/42/14/163/21

before the Commission for Mediation and Arbitration henceforth CMA at Kinondoni.

Respondent was the complainant in the Commission for Mediation and Arbitration where she instituted Labour dispute No. CMA/DSM/KIN/42/14/163/21 against the applicant on unfair termination. The Arbitrator after hearing the parties decided that there was unfair termination based on the initiative of the employer which is constructive termination. The arbitrator ordered the applicant to pay the respondent 32 months' salary as a compensation for illegally detaining her properties, discrimination and constructive termination, a one-month salary in lieu of notice, severance allowance, leave 28 days and Certificate of Service. Aggrieved with the CMA award, applicant preferred this revision.

The applicant was aggrieved by CMA award and has lodged this application for revision seeking the court to revise and set aside the said award. In the affidavit of Hilda Medard, her Human Resource Manager, applicant in support of the application raised six grounds of revision namely:

- 1. That, the Hon. Arbitrator erred in law and facts by failure to record and analyze properly evidence which were before him and jump into the*

wrongly conclusion contrary to the evidences adduced by parties to the labour dispute

- 2. The arbitrator never accorded proper wait to the applicant's testimonies. Further, she failed to properly analyze the evidence presented especially through the contract of employment and circumstances leading to termination of employment*
- 3. That the arbitrator erred in law by observing wrong interpretation of forced resignation at a time when the employee was not even at work*
- 4. That the remedies granted by the arbitrator were never testified for during the hearing*
- 5. That the award does not reflect the proceeding of the case*
- 6. That the Honorable Arbitrator exercised its jurisdiction with material irregularity in that it awarded compensation even far beyond what the employee had prayed for and without any justification.*

Respondent resisted the application by filing both the Notice of Opposition and the counter affidavit.

When the application was called on for hearing, Mr. Praygod Uiso, learned counsel appeared and argued for and on behalf of the applicant while Mr. Benard Mpwaga, learned counsel appeared and argued for and on behalf of the respondent.

In arguing the 1, 2nd and 5th ground, Mr. Uisso, learned counsel for the applicant submitted that arbitrator did not properly record evidence of the applicant. He submitted that at the time PW1 and PW2 were testifying, they were cross examined but questions in the cross examination does not

feature in the award. When asked by the court as whether there is any other complaint relating to failure to record evidence of the applicant apart from absence of questions that PW1 and PW2 were asked during cross examination, he replied that there is none.

On the complaint that arbitrator did not properly analyze evidence of the parties, counsel for the applicant submitted that, respondent and her witnesses testified that they were employed by the applicant but they had no proof to that effect including tendering of exhibits. Counsel submitted further that, PW3 testified that he was employed by the applicant but did not give proof of employment including contract of employment or identity card. He went on that, in their evidence both DW1 and DW2 testified that they do not know PW2 and PW3.

On the complaint that the award does not reflect proceedings, Mr. Uisso learned counsel for the applicant submitted that, in the award it is recorded that respondent had more one witness while in fact, had two more witnesses. Counsel for the applicant submitted further that, in the award, arbitrator indicated that applicant sold the company to Ismail and changed management which led to termination of the respondent. Counsel

for the applicant went on that, that issue was never discussed by the parties and concluded that the award contains extraneous matters.

Arguing in support of the 3rd ground, Mr. Uisso submitted that the arbitrator erred to hold that there was constructive termination. He submitted further that, prior to 08th January 2014, respondent was not at work, allegedly, that she was sick and that on 08th January 2014 she alleged that she was prevented at the gate by watchman to enter in office. Mr. Uisso submitted further that respondent was employed as Cook. He went on that respondent alleged that Yusuph Midole (who did not testify) was employed to take over her job but exhibit D7 shows that Midole was employed as executive chef that is a different position. Mr. Uisso strongly submitted that applicant did not make employment intolerable because the two employees had different duties.

Arguing in support of the 4th and 6th grounds, counsel for the applicant submitted that respondent was awarded TZS 24,216,923/= being 32 months' salary compensation but in her evidence, respondent prayed to be awarded 12 months compensation. Counsel for the applicant submitted further that in awarding the respondent 32 months, arbitrator stated that applicant was prevented to enter in office and that her property were

locked in the applicant's office. Counsel for the applicant submitted that arbitrator was not fair and prayed the application be allowed.

In resisting the application, Mr. Benard, learned counsel for the respondent submitted that applicant is complaining against evidence of PW2 and PW3 but has not criticized evidence of PW1. Counsel submitted further that PW2 and PW3 testified that they were working with the applicant and stated how they knew applicant and her employees. Counsel for the respondent added that evidence of both PW2 and PW3 were not contradicted by evidence of the applicant. It was submission of Mr. Bernard that applicant did not call witnesses to testify on what was going on between herself and respondent. He added that Persons who respondent complained against that led her employment to be intolerable were not called as witnesses despite the fact that respondent testified first. Counsel for the respondent submitted that, in her evidence, respondent stated that Gupree Singh and Dinish Anthon are the ones who made employment to be intolerable but they were not called as witnesses by the applicant. He clarified that in her evidence, respondent stated that, Gupree Singh is the one who issued an order to PW2 to prevent respondent to enter in office. He went on that, Dinish Anthon, the group General Manager, directed

respondent orally to move and work in another hotel. He went on that respondent prayed to be issued written transfer(exhibit P2)but Dinish Anthon did not respond.

Responding to the complaint that the arbitrator did not analyze evidence properly, counsel for the respondent submitted that evidence was properly analyzed. On interpretation of forced resignation, counsel for the respondent submitted that the arbitrator properly interpreted what amounts to forced resignation or constructive termination and related it to the evidence on record. Counsel argued that respondent was sick and referred to exhibit P4 and submit that she did not abscond. Counsel argued in alternative that, even if assumed that she absconded, which is not true, applicant was supposed to follow procedures for termination. Mr. Bernard strongly submitted that there was constructive termination.

On remedies awarded to the respondent, Mr. Bernard submitted that remedies granted to the respondent are reflected in evidence and the CMA F1. He conceded that, in CMA F1 respondent, did not pray to be paid 32 months. He argued that, in the award, the arbitrator only considered that property of the respondent was closed in the office as a result, respondent was unable to access them. He maintained that respondent was properly

awarded because she worked with the applicant for 16 years with unspecified contract of employment. He therefore prayed the application be dismissed.

In rejoinder, Mr. Uisso reiterated his submissions in chief that there was no constructive termination. Counsel for the applicant conceded that applicant did not respond to the prayer by the respondent to be given a letter for transfer. On failure of applicant to call Gupree Singh and Dinish Anthon, counsel for the applicant respondent that applicant did not see importance of calling them because they were not involved in causing employment to be intolerable.

I have examined the CMA record and considered submissions by the parties in this application and find that the issues to be answered by this court is whether termination was fair or not and what is the relief the parties are entitled to.

In order to answer the first issue, I have scrutinized evidence of the parties and find that Jane Mwikwabe(PW1), the respondent, testified that in 2013 applicant employed one Yusuph to perform her duties and that three days thereafter, applicant changed office padlock and office keys on ground that she (respondent) was not allowed to enter into the said office.

She testified further that, on 21st November 2013 she was verbally informed by the manager that she will be transferred to Oysterbay branch but on 22nd November 2013 she wrote a letter (exh. P2) demanding inter-alia to be issued with a written letter. PW1 testified further that, she fell sick and was issued with ED and that she was reporting at work at the time her health condition improved. She tendered medical reports and Exempt from duty as exhibit P4 collectively). She added that on 17th December 2013 applicant served her with a letter(exhibit P3) with intention to terminate her employment allegedly due to absenteeism. PW1 testified further that she was not paid salary for December 2013. PW1 added that, on 8th January 2014 at 14:00hrs one Gupre Singh the manager of the applicant issued an order to security guards that she should not be allowed to pass the gate and enter into office. PW1 stated further that, when the said Gupre Singh was called, he stated that the said order was issued by the management of the applicant. On 2nd January 2014, PW1 wrote a letter (exh. P5) complaining as to why she was denied access to office but no reply. Evidence of the respondent (PW1) was not shaken during cross examination. Evidence of PW1 in relation to denial of access to office on 8th January 2014 is supported by evidence of Dominic Yohana

Simba(PW2)who received the order from Mr. Singh and complied with the order by not allowing PW1 to cross the gate with a view of entering into office. That evidence was also not shaken during cross examination. Samwel Mtibani(PW3) corroborated evidence of PW1 that having employed Yusuph, applicant changed office padlock and handled the key to the said Yusuph.

On the other hand, Sella Sekela (DW1) testified that respondent was terminated due to absenteeism. DW1 testified further that Yusuf Midole was employed as executive chef while respondent was employed as cook. During cross examination, DW1 testified that respondent was reporting to resident manager namely Mr. Singh. She stated further that, it is not true that the said Mr. Singh did not issue an order denying respondent access to office.

I should point out albeit briefly that, that evidence of DW1 under cross examination is hearsay because nothing is stated in her evidence to show that she witnesses what she testified. Therefore, she cannot testify on matters that happened in her absence. More so the said Mr. Singh did not testify.

Hilda Medard(DW2) testified that there is no constructive termination because respondent was terminated due to absenteeism. DW2 tendered the warning letter(exh.D1), Notice to show cause dated 13th November 2013(exh. D2), intention to terminate employment dated 10th December 2013 (exh. D3), reply to show cause dated 18th December 2013 (exh.D4), Notice to attend disciplinary hearing dated 8th January 2014 and minutes of the disciplinary hearing that was held on 14th August 2014 in absence of the respondent (exh. D5) allegedly that respondent refused to attend. In her evidence, DW2 testified that respondent did not fill sick sheet.

While under cross examination, DW2 stated that she can't remember as to when respondent's absenteeism started. DW2 testified further that on 8th January 2014 she was not in office and that she wrote exhibit D4 but was signed by Sekela because she (DW2) was not in office. She added that respondent was served with a letter by Singh but she refused to receive it. Evidence that respondent refused to receive a letter from Mr. Singh is hearsay because DW2 did not witness that incident and Mr. Singh was not called as a witness.

From the fore evidence of the parties, it is my view that applicant made employment of the respondent intolerable. It is my view that

conditions set out by the Court of Appeal in the case of *Kobil Tanzania Limited vs Fabrice Ezaovi*, Civil Appeal No.134 of 2017(unreported) were met in the application at hand. In my view, change of padlock, denial of December 2013 salary, denial of access to office and intention to terminate employment of the respondent despite the fact that respondent had medical reports and ED(exhibit P4) collectively that were duly endorsed by the applicant is a clear manifestation that applicant made employment of the respondent intolerable.

It was submitted by counsel for the applicant that the arbitrator did not record some questions asked to PW2 and PW3 during cross examination. This ground cannot detain me because a court record is a serious document and the presumption is that it accurately represents what happened, therefore, it cannot be lightly impeached. See the case of *Halfani Sudiv v. Abieza Chichili* [1998] T.L.R 527, *Iddy Salum @ Fredy vs Republic* (Criminal Appeal No. 192 of 2018) [2020] TZCA 1853 and *Salehe Omary Ititi vs Nina Hassan Kimaro* (Civil Application 583 of 2021) [2023] TZCA 232 to mention but a few. I should add that, even proceedings of the quasi-judicial body like CMA cannot be easily impeached. It is my view that, it is unsafe to accept submissions by

counsel for the applicant that some questions put to both PW2 and PW3 were not recorded because the court cannot for sure know whether the alleged questions were asked or not.

In an attempt to discredit evidence of PW2 and PW3, it was submitted by counsel for the applicant that both DW1 and DW2 testified that PW2 and PW3 were not employees of the applicant. It is my view that evidence of PW2 and PW3 were not shaken during cross examination. Applicant had that opportunity at the time these witnesses were testifying but she did not. No question was asked to these witnesses during cross examination showing that they were not employees of the applicant or that they did not witness what they testified to. Since that did not happen, applicant cannot do so through a back door in their absence denying them an opportunity to state what they know. I have scrutinized evidence and from what I have analyzed hereinabove, I am of the settled mind that the complaint that arbitrator did not properly analyze evidence cannot help the applicant in this application.

It was submitted by counsel for the respondent that an adverse inference should be drawn against the applicant for failure to call Gupree Singh as a witness. I agree with that submissions because no justification

was given by the applicant for not calling Gupre Singh as her witness. The only inference for that failure is that applicant feared that the said person would have given evidence adverse to her interest.

For all discussed hereinabove, I hold that the application is unmerited and liable to be dismissed as I hereby do.

Dated at Dar es Salaam on this 29th May 2023.



B. E. K. Mganga
JUDGE

Judgment delivered on this 29th May 2023 in chambers in the presence of Gilbert Mushi, Advocate holding brief of Praygod Uisso, Advocate for the Applicant but in the absence of the Respondent.



B. E. K. Mganga
JUDGE