

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 62 OF 2023

(Arising from the decision of the Commission for Mediation and Arbitration of Dar es Salaam at Kinondoni, Labour Dispute No. CMA/DSM/KIN/40/2022/22/29/2022 by Hon. Igogo, M. Arbitrator dated 30th January, 2023)

BETWEEN

RENALDA ALOYCE MREMA APPLICANT

VERSUS

EPIC HOLDINGS COMPANY LIMITED..... RESPONDENT

JUDGEMENT

Date of last Order: 31/05/2023

Date of Judgement: 13/06/2023

MLYAMBINA, J.

The Applicant in this application was aggrieved with the decision of the Commission for Mediation and Arbitration (herein CMA) in *Labour Dispute No. CMA/DSM/KIN/40/2022/20/29/2022* which was delivered by Hon Igogo, M. (Arbitrator) on 30th January, 2023. Hence this application seeking for the Court to examine and revise the Award thereto and further order the Respondent to pay the Applicant compensation for unfair termination and terminal benefits to the tune of TZS 8,757,693/=. The application was supported by the Applicant's affidavit having two grounds for revision, namely:

- 1. That, the Arbitrator erred in fact and in law in deciding that the labour dispute was prematurely filed without considering the adduced evidences by parties to the labour dispute.*

2. That, the Arbitrator erred in fact and in law by deciding that the Applicant was not terminated but failed to elaborate the employment status of the Applicant.

In response, the Respondent resisted the application by filing both the notice of opposition and the counter affidavit sworn by Regina Felix Simfukwe, her Company Manager.

When the application was called for hearing, Mr. Edward Simkoko, Personal Representative, appeared and argued for and on behalf of the Applicant, while Mr. Joachim Joliga, Personal Representative, appeared and argued for and on behalf of the Respondent.

In respect of the first issue, that the case was filed pre-maturely, Mr. Simkoko submitted that; the Applicant was employed on 16/10/2015 in the capacity of Cashier under oral contract. He submitted further that; on October 2021, the Respondent suspended the Applicant from work temporarily. Mr. Simkoko added that; on 11/01/2022, the Respondent terminated the Applicant's employment orally.

Mr. Simkoko argued further that the Applicant was aggrieved and filed a complaint before CMA complaining on unfair termination. He further submitted that the Respondent then started paying the Applicant her salary arrears of January, 2022 which was paid on 5th March, 2022. He added that; the Respondent paid the Applicant the salary for the

month of March, 2022 and of February, 2022. Mr. Simkoko pointed out clear that all those salaries were paid while the labour dispute was pending before CMA.

It was the argument of Mr. Simkoko that the termination was based on theft of money, hence the employer was supposed to comply with the law by adhering to the prescribed procedures namely: *One*, issuance of letter to the Applicant on the said theft allegation. *Two*, summoning the Applicant to the disciplinary Committee. *Three*, termination, if the Applicant was found in violation of the employment principles.

He submitted further that the Respondent was supposed to avail the Applicant with minutes for termination. He insisted that, the Respondent did not comply with any of the legal requirements. Mr. Simkoko submitted further that the evidence shows that the case was not filed prematurely. He added that; the Applicant was not paid salary for three months. The Arbitrator erred in holding that the complaint was filed prematurely.

Arguing in support of the second ground, Mr. Simkoko submitted that; the Arbitrator erred in holding that the Applicant was not terminated because he failed to state the status of the Applicant's employment. Mr. Simkoko argued that the Arbitrator left the status of the Applicant

hanging. Mr. Simkoko added that; the Arbitrator never stated if there was constructive termination.

Mr. Simkoko concluded that the Applicant was unfairly terminated and prayed for the Applicant be Awarded compensation to the tune of TZS 8,757,693/= as remedies stipulated under *Section 40 (1)(c) of ELRA (Cap 366 Revised Edition 2019)*.

In resisting the application, Mr. Joachim Joliga, Personal Representative for the Respondent submitted on the 1st ground that; salary is a right of an employee and payment of arrears cannot be due to the fear of a pending case at CMA. He submitted that there was economic inflation. Mr. Joliga argued that the Applicant's Personal Representative did not show to the Court on which provisions of the law were violated.

Mr. Joliga submitted further that; any dispute filed prematurely renders the Court lack jurisdiction as was discussed at page 14 of the CMA decision. In cementing his assertion, Mr. Joliga cited the case of **Donatha Crispin Kiiza and Judith Onesmo Joel v. Village Supermarket Ltd**, Labour Revision No. 330 of 2022, High Cour Labour Division at Dar es Salaam (unreported), pp. 9-10.

Mr. Joliga argued that; the Applicant had a duty to file a complaint on suspension at work or claim salary arrears but not on unfair

termination. He added that; there was no any unfair termination as rightly held by the CMA but rather the Applicant terminated herself from work. Mr. Joliga cited the case of **Tanzania Ports Authority v. Halima Kassim Juma Revision**, No. 243 of 2020, High Court Labour Division at Dar es Salaam (unreported), p. 8.

On the second ground, Mr. Joliga submitted that; it was not a duty of CMA to state on the status of the Applicant's employment because it was not her employer. Mr. Joliga submitted further that the Applicant terminated herself from work as there was no any law stated by the Applicant to have been violated by CMA. He added that; on 29/05/2023, even this Court through *Revision Application No. 94/2023* found the case pre-maturely.

Mr. Joliga submitted that the Applicant is not entitled to the claimed relief (s) as the complaint was prematurely filed and the Applicant terminated herself from employment. He concluded by praying for the application be dismissed for lack of merits.

In rejoinder, Mr. Simkoko, submitted that the Respondent has not stated on the ground that proves the Applicant was on employment. He further submitted that the case of **Donatha Crispin Kiiza** (*supra*) is distinguishable as in that case the disciplinary procedures were complied with contrary to the scenario of this case.

After perusing records of the CMA, pleadings and submissions before this Court, the issue to be determined is; *whether the CMA decision was proper*. The facts produced by the Applicant does not possess any element of unfair termination, hence there is no termination done by the Respondent against the Applicant. The reason is that when the Applicant was suspended the Respondent was still discharging her obligation to pay the Applicant's salary though not to the fullest.

It is in record that until when the Applicant went to report to her worker's Association named TASIWU, the Respondent told her that there were some claims from customers that when they went to deposit their cash to her, they have been told by the Applicant that there is deficit of some amount while the customers believed the Applicant was handed over full cash.

The records reveal that TASIWU summoned the Respondent to determine when that investigation will come to an end and why the Respondent did not pay the Applicant full amount of salary during the investigation period. Unfortunately, the Respondent firmly told TASIWU that she is no longer an Employer of the Applicant, and she has no any labour responsibility of the Applicant. The Applicant was then advised by TASIWU to file her formal claims at CMA an. On 19/01/2022 the Applicant filed *Labour Dispute No. CMA/DSM/KIN/40/2022/20/29/2022*.

When the claim was pending at CMA, surprisingly, the Respondent continued to pay salary arrears to the Applicant up to February, 2022. With neither a notice to the Applicant nor to the TASIWU, the Respondent from there stopped to pay the Applicant's salary while during the CMA session and testimonies claimed that she never terminated the Applicant but merely suspended.

After reviewing and scrutinizing the above facts, it is the findings of this Court that the Respondent admitted unequivocally before CMA and this Court that she never terminated the Applicant but rather suspended her. Henceforth, the said suspension falls under *Rule 27 (1) of the Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007* which provides that:

*Where there are serious allegations of misconduct or incapacity, an employer may suspend an employee **on full remuneration** whilst the allegations are investigated and pending further action. (Emphasis added)*

It is indisputable valid that the Respondent suspended the Applicant due to the allegation of misconduct as the customers claim when they deposited their cash, it happened in many occasions to be told that deposited amount did not reach to their calculated value for instance when they gave the Applicant 1,000,000/= the Applicant told the customer that the amount did not reach 1,000,000/= but rather

970,000/=. The Applicant was assumed to benefit herself from the customers' money, that is why the Applicant was suspended from her job.

Due to that suspicion, the Respondent legally had a mandate to suspend the Applicant simply because she was exercising her legal rights under *Rule 27 (1) of the Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007*.

However, the said *Rule 27 (1) of the Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007*, provides a legal duty to the Respondent that during exercising her right to suspend the Applicant, she must pay the Applicant her full remuneration during all time of suspension as the Respondent claimed the Applicant is under investigation.

The trial CMA, after delivering her decision, failed to provide the relief(s) the parties were entitled under *Rule 27 (1) of the Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007*. The Respondent ought to pay regular remuneration in favor of the Applicant until what is so called "investigation" will be completed or the Respondent decides to resume the employment of the Applicant of which until todate the Respondent's investigation has never come to an end.

Henceforth, this Court hereby orders the Respondent to pay the Applicant her monthly actual remuneration from 1st March, 2022 to the

date of this judgement and further to the date of finalizing the investigation or resuming the Applicant's employment.

Consequently, the Revision Application is allowed, and the CMA Award is set aside. No order as to costs.

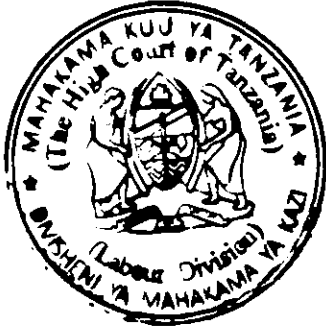


Y.J. MLYAMBINA

JUDGE

13/06/2023

Judgement pronounced and dated 13th June, 2023 in the presence of Mr. Edward Simkoko, Personal Representative of the Applicant and Mr. Joachim Joliga, Personal Representative of the Respondent.



Y.J. MLYAMBINA

JUDGE

13/06/2023