

IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 315 OF 2022

NOBLE APARTMENTS LIMITEDAPPLICANT

VERSUS

STELLA B. ASSEYRESPONDENT

(From the decision of the Commission for Mediation and Arbitration of DSM at ILALA)

(Mbeni: Arbitrator)

Dated 17th August, 2022

in

REF: CMA/DSM/ILA/592/2020/152/21

JUDGEMENT

9th & 23rd February, 2023

Rwizile, J

In this application, this Court has been asked to revise and set aside the award of the Commission for Mediation and Arbitration (CMA) in Labour Dispute No. CMA/DSM/ILA/592/2020/152/21 of 17th August 2022.

Facts in brief, can be stated that the respondent was employed by the applicant as a caretaker at her premises in the city suburb. The employment was permanent at the consideration of 700,000.00TZS per month. In 2020 however, the apartment business went bad due to effects of COVID-19. Some of the apartments went vacant. It is this time when the applicant effected termination of employment by retrenchment.

Not satisfied with termination, the respondent filed a labour dispute with the CMA, claiming for terminal benefits due to unfair termination. The CMA, heard the dispute and was convinced that the applicant unlawfully terminated the respondent and thereby ordered payment of the sum of 9,800,000.00TZS. The applicant was not okey with the award, hence this application.

At the hearing before the CMA, the applicant raised the issue of time limitation of filing the dispute before it. It was however, overruled on ground that the applicant did not prove, since she is cast with the duty, to prove when the respondent was terminated. The centre of this application therefore is two-fold as per the affidavit in support. **First**, whether the CMA had jurisdiction to hear a dispute which was filed out of time. **second**, whether the CMA considered the evidence on record before arriving at its decision.

My determination on the issues starts with the first one. I have to admit that the CMA was right in holding that the duty to prove fairness termination lies on the employer. Equally, it is the duty of the applicant- the employer to prove when was the respondent terminated. In record, as submitted orally by Sharifa Mohamed advocate for the applicant, termination of the respondent occurred on 25th March 2020- exhibit D1.

In the same tune, exhibit P1 is the same letter as tendered by the respondent and as submitted by Mr. Temba- a personal representative of the respondent. The dispute here is not on the date the letter was signed but on when the same was served to the respondent.

For the respondent, it was argued, it was served to her on 18th June 2020. The two letters are in duplicate. The difference between them, is that P1 is signed by the respondent with a date of receipt, while D1 has her signature but not written the date of receipt. This therefore pauses a great deal of thinking and investigation on what real happened.

This letter aside, the applicant submitted, the respondent was terminated on the date of the letter and was informed of it, despite not stating who served that letter to her. But other evidence tendered by the applicant are exhibits D2 collectively, which is a letter to the respondent dated 6th April 2020 referring to the letter written by her to the applicant on 26th March 2020 in respect of payment of terminal dues.

In this letter, it is admitted that her letter dated 26th March and 5th April 2020 was received. It was made clear that her terminal dues will be paid as agreed because she was well aware of the difficulties the company was facing in terms of cash flow. It was further stated that on same day i.e 6th

April 2020, part payment was being prepared as salary for the month of March 2020.

For easy reference the letter stated;

NOBLE APARTMENTS
LIMITED
P.O.Box 20066 Dar es
Salaam (Tanzania)
Phone + 255 222150413/2150403
Fax + 255 222150416 E –
mail: info@noble -tz.com

Stellah B Assey,
P.O.Box 70159,
DAR ES SALAAM

YAH: BARUA YA KUSIMAMISHWA KAZI

Husika na kichwa cha habari.

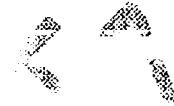
Tunakiri kupokea barua zako za tarehe 26/03/2020 na tarehe 5/04/2020 kuhusiana na malipo yako ya kuachishwa kazi, naomba nikuhakikishie malipo yako ya msingi tuliokubaliana yatalipwa kama ambavyo tumekubaliana, kama unavyoelewa kwa sasa kampuni inapitia wakati mgumu kifedha na kibiashara. Kampuni haina nia mbaya yoyote kukucheleweshea malipo hayo.

Madai mengine uliyoyatoa bado yanafanyiwa kazi, katika ngazi ya uongozi na vyombo husika, muafaka wowote utakao patikana utajulishwa ili tuweze kufikia muafaka.

Leo hii tarehe 06/04/2020 tunaandaa malipo yako ya mshahra wa mwezi wa March 2020 na utapewa taarifa kwa ajili ya malipo mengine yaliyobakia na kampuni itajitahidi kulipa madai hayo haraka itakavyowezezana ili uweze kuendelea na maisha yako mengine.

Ahsante.

*Frederick Maeda
Afisa Utumishi*



Another exhibit-D2 is payment voucher in the name of the respondent dated 06th April 2020 paying the amount of: 674,000.00TZS. And it was specific that it is for salary of March as per termination letter. The exhibit shows as follows;

Payment Voucher

*"...Paid to STELLAH ASSEY
By cheque/ Cash of 06/04/2020 for the amount of:*

674,000

Shs

In words Six hundred seventy-four thousand only

*For payment for the salary of March as per termination letter
2020*

..."

As if this is not enough, exhibit D1 collectively has a letter by her dated 26th Mach 2020 referring to termination and claims her terminal benefits.

It states as follows:

STELLAH B. ASSEY
P.O.Box 70159,
DAR ES SALAAM
26TH MARCH 2020
Jrsafi@yahoo.com

NOBLE APARTMENT LTD
P.O.Box 20066,
DAR ES SALAAM
TANZANIA

YAH: BARUA YA KUSIMAMISHWA KAZI

Kwako muhusika,

Tafadhali rejea barua yako ya tarehe 25/03/2020, barua hiyo ikieleza kuhusu kusimamishwa kwangu kazi kutokana na ofisi kuendeshwa kwa hasara, hali iliyopelekea ofisi ishindwe kuendelea kunilipa kutokana na gharama za uendeshaji kuwa juu, na mwenendo wa biashara kuwa dhaifu zaidi kutokana na maradhi ya corona. Katika barua hiyo pia umeeleza kuwa malipo yangu yatafanyika kwa kufuata utaratibu wa ajira ya kazi Tanzania ambapo ahinisho lako lilikua kama ifuatavyo.

Malipo ya taarifa ya kuachishwa kazi (notice) 700,000

Kiinua mgongo (severance allowance) 1,884,615.38

Mshahara wa mwezi wa 3 (March salary) 673,076.92

Salio la likizo (leave outstanding) naamini hii ni ya 2020, 163,333.33

Jumla 3,421,025.64

*Nimeridhika na malipo haya ya awali kama yalivyofanyika hapo juu, na nilivyokubaliana na Fred na Sharifa wakati wa kikao chetu na ninaomba nilipwe haraka "**ikiwezekana leo**" ili niendeele na maisha kwakuwa sina kipato chochote nilichokua nakitegemea kwa wakati huu na familia yangu isiadhirike na hali hii ya mimi kutokua na ajira kwa sasa. Lakini pia naiomba ofisi yako izingatie malipo*

yangu yafuatayo kwakuwa nayo ni haki yangu ya msingi na yapo kwenye utaratibu wa sheria ya ajira ya kazi Tanzania.

Malipo ya likizo za miaka ambayo sikuchukua na sikulipwa na niliyochukua lakini bila malipo ya mfuko wa hifadhi ya jamii NCCF.

Malipo ya ajali niliyopata kazini na kujitibia mwenyewe.

Cheti cha huduma (Certificate of Service)

Malipo ya kufanya kazi muda wa ziada (overtime) ikiwepo nyakati za usiku na sikuwahi kupata malipo.

Makato ya shilingi 250,000 ya pampu ya maji mliyonikata ambayo niliahinisha kuwa ilikua ni uonevu mzee Jitu aliniarifu kuwa malipo hayo yangefanyika kama nilivyoanisha pia kwenye barua pepe yangu ya tarehe.

Nitashukuru kama hayo niliyoanisha yatazingatiwa na kunillpa kwa wakati ili familia yangu isipate matatizo ya huduma na mimi nisigombane na ofisi yangu niliyoihudumia kwa kipindi kirefu.

Wenu katika kazi.

Stellah Assey.

Exhibit D3 is a document that refers to payment of the sum of 3,421,025.00TZS, which the respondent admits to have received on 6th May 2020. In that document, it is stated the amount of 673,077.00TZS was paid previously as in D2- the payment voucher. It shows as follows;

I Stella Assey I have received today Tshs. 2,747,000/= which is part of my total payment Tshs. 3,422,000/= I agreed on termination as follows:

1) Notice pay Tshs. 700,000/=

2) Severance Allowance Tshs. 1,884,615/=

3) Salary for March 2020 Tshs. 673,077/= Paid on 06/04/2020

4) Leave for the year 2020 Tshs. 163,333/=

Total Tshs. **3,421,025/=**

Stellah Assey

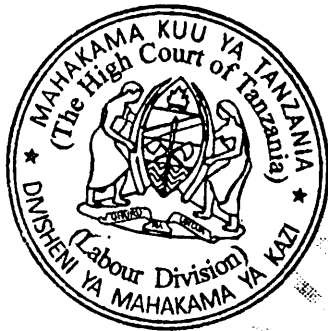
Signature: sgd.: 06/05/2020

Of interest from the above, letters have the signature of the respondent. The letters are chronological and refer to events in the manner they were unfolding. It doesn't appeal to me that with all this information, the CMA decided to believe in the respondent's account only. The respondent's account is based on exhibit P1 where she wrote the words *received on 18th June 2020*.

In normal parlance, it would sound absurd for the employer to terminate the employee on 23th March 2020, which is not disputed by all parties but yet communicate the letter of termination on 18th June 2020, nearly three months thereafter.

The letters referred before, which I have no doubt have the signature of the respondent and the payment vouchers specifically referred to termination of the respondent.

With the above, I do not think the arbitrator was justified to hold that there was no proof of termination of the respondent until 18th June 2020. Based on the available evidence and the fact that the claims of unfair termination as per rule 10(1) of the Labour Institutions (Mediation and Arbitration) Rules GN. 64 of 2007, have to be filed before the CMA in 30 days, the dispute was filed out of time. Condonation was a necessary step. This application therefore has merit. The decision of the CMA is quashed and orders set aside. Each party to bear its own costs.



A.K. Rwizile

JUDGE

23.02.2023

Labour Institutions