

**IN THE HIGH COURT OF TANZANIA**

**LABOUR DIVISION**

**AT DAR ES SALAAM**

**REVISION APPLICATION NO. 181 OF 2023**

*(Arising from an Award issued on 28/7/2023 by Hon. Mbeni, M.S, Arbitrator, in Labour dispute No. CMA/DSM/ILA/154/2020/10/22 at Ilala)*

**JAPHET ANGELO KIYEYU ..... APPLICANT**

**VERSUS**

**KAMAKA COMPANY LIMITED ..... RESPONDENT**

**JUDGMENT**

*Date of last Order: 20/09/2023  
Date of Judgment: 27/09/2023*

**B. E. K. Mganga, J.**

Brief facts of this application are that, applicant was an employee of the respondent for unspecified period contract of employment as security guard. It is undisputed that, on 14<sup>th</sup> December 2019, while at work, one Seleman Kambongo also an employee of the respondent, was arrested by police and detained at Urafiki Police Station on allegation of theft that occurred at the respondent's workplace. On 17<sup>th</sup> December 2019, applicant was also arrested and detained at the same police

station for similar allegations. It is said that, on 24<sup>th</sup> December 2019, applicant was released on bail as a result, on 26<sup>th</sup> December 2019, he went at his workplace and find the office closed. It is said that, on 3<sup>rd</sup> January 2020, applicant went at office, but he was not given access by the respondent on allegation that he is a thief. It is said that, on 3<sup>rd</sup> January 2020, respondent called again Police officers who came and arrested applicant and detained him again at Urafiki Police Station on allegation that applicant breached peace at respondent's workplace. It is undisputed that, applicant and his co-employees, remained under police custody until on 14<sup>th</sup> January 2020 when they were charged with Criminal case No. 3 of 2020 in the Resident Magistrate's Court of Dar es Salaam at Kisutu for the offence of stealing by servant contrary to the provisions of section 258 and 271(1) of the Penal Code [Cap. 16 R.E. 2019]. It is undisputed that, on 22<sup>nd</sup> January 2020, applicant was bailed out. It is further undisputed that, on 19<sup>th</sup> February 2020, applicant filed the dispute before the Commission for Mediation and Arbitration (CMA). In the Referral Form (CMA F1), applicant was indicated that he was claiming to be reinstated without loss of remuneration, be paid 24 months' salary compensation for unfair termination and TZS 100,000,000/= as general damages. It is also undisputed that, on 07<sup>th</sup>

January 2022 applicant and 4 Others were found not guilty and acquitted.

On 28<sup>th</sup> July 2023, Hon. Mbeni, M.S, Arbitrator, having heard evidence of the parties, issued an award that applicant failed to prove that respondent terminated his employment and dismissed the dispute.

Applicant was aggrieved with the said award hence this application for revision. In the affidavit in support of the Notice of Application, applicant raised two grounds namely: -

- 1. That the Hon. Arbitrator erred in law and facts by holding that applicant failed to prove that respondent terminated his employment.*
- 2. That the arbitrator erred in law in dismissing the complaint.*

Respondent did not want this application to go unopposed. She therefore filed the counter affidavit affirmed by Bakari Juma, her learned advocate.

When the application was called on for hearing, Mr. Charles Lugaila, learned advocate, appeared and argued for and on behalf of the applicant, while Mr. Bakari Juma, learned advocate, appeared and argued for and on behalf of the respondent.

Arguing in support of the application, Mr. Lugaila submitted generally that, respondent orally terminated employment of the applicant on 03<sup>rd</sup> January 2020. He submitted further that, at CMA,

respondent testified that she did not terminate employment of the applicant. He went on that, in the award, the arbitrator held that the dispute was prematurely filed because there was no termination. Counsel for the applicant submitted further that, in his evidence, DW1 testified under cross examination that, respondent did not terminate employment of the applicant and that, the last period applicant was paid salary was in January 2020. Counsel submitted further that, DW1 testified further that, respondent was waiting to see whether the Republic will appeal against the acquittal before reinstating the applicant.

Counsel for the applicant submitted further that, it was evidence of the respondent that applicant absconded for more than five days. He cited the case of ***Praiseglory Kileo v. Earthways Logistics Ltd***, Revision No. 109 of 2020, HC (unreported) to implore the court to hold that there was termination by design and that, respondent had a duty to prove that she did not terminate the applicant. Counsel for the applicant added that, no evidence was adduced by the respondent to show that she followed fair procedures of termination. He concluded his submissions by praying the court to allow the application, quash and set aside the award.

Resisting the application, Mr. Juma, learned counsel for the respondent submitted that the arbitrator was justified to hold that applicant did not prove that his employment was terminated by the respondent. Relying on evidence of DW1, counsel for the respondent strongly submitted that, respondent did not terminate employment of the applicant. He added that, up to now, there is no termination letter hence applicant is an employee of the respondent. In his submissions, learned counsel for the respondent conceded that, respondent had not paid applicant salary from January 2020 up to now.

Counsel for the respondent conceded further that, it is the respondent who reported at Police, as a result, Criminal Case No. 3 of 2020 was filed against applicant and others. He conceded further that, at the time of filing the dispute at CMA, the said criminal case was pending and that, during the period the said criminal case was pending in court, respondent was supposed to pay applicant salary, but she did not. Mr. Juma was quick to add that, in terms of Section 37(5) of the Employment and Labour Relations Act [Cap. 366 R.E. 2019] respondent was prohibited to take disciplinary measures against the applicant, which is why, she did not terminate employment of the applicant. He maintained that; applicant failed to prove that respondent terminated his

employment. He concluded his submission praying the court to dismiss this this application for want of merit.

I should point out that learned counsel for the applicant had no rejoinder submissions.

I have carefully examined evidence of the parties in the CMA record and considered rival submission in this application and issues are whether, there is proof that respondent terminated employment of the applicant and the reliefs thereof.

It was evidence of the applicant (PW1) that on 3<sup>rd</sup> January 2020, one Jackson Huka prevented him to enter office allegedly that, he (PW1) is a thief and that, police officers were called, as a result, he was arrested and detained at Urafiki Police Station allegedly that he breached peace at the respondent's workplace. It was evidence of PW1 that he after arrest, he was detained at Police Station until on 14<sup>th</sup> January 2020 when he was charged in court and bailed out on 22<sup>nd</sup> January 2020. That piece of evidence remained unshaken by evidence of the respondent. In fact, applicant was not cross examined on that aspect by the respondent. It is my view that, failure of the respondent to cross examine applicant on that aspect, amounted to acceptance of the truthfulness of the appellant's account by the respondent. See the case of [\*\*Shadrack Balinago vs Fikir Mohamed @ Hamza & Others\*\*](#)

(Civil Application 25 of 2019) [2021] TZCA 45 and [Paulina Samson Ndawavya vs Theresia Thomasi Madaha](#) (Civil Appeal 45 of 2017) [2019] TZCA 453.

I have examined evidence of Seleman Kabango (PW2) relating to termination of employment of the applicant and find that it is hearsay hence cannot be acted upon.

I have also noted that evidence of Simon John Mdae (DW1) that respondent did not terminate employment of the applicant remains unchallenged. While testifying under cross examination, DW1 stated that he has no evidence relating to termination of the applicant and that, at the time applicant was facing a criminal case in court, he was not paid salary.

It is my opinion from the foregoing evidence of the parties that, applicant did not prove that his employment was terminated by the respondent. It is also clear from evidence of the respondent that, she has not terminated employment of the applicant. More so, evidence shows that since January 2020 up to now, respondent has not paid applicant salary though she claims that applicant is her employee. I therefore hold that respondent has not terminated employment of the applicant and that applicant up to now, is an employee of the

respondent. Therefore, since respondent has not terminated employment of the applicant, and since the parties had unspecified period contract of employment, then, applicant has a right to claim his salary from January 2020 up to the date of this judgment. Respondent has an obligation to pay applicant that salary and continue to pay salary to the applicant as one of her employees until when their contract of employment will be terminated mutually or upon compulsory retirement of the applicant. I should clarify that, claims of applicant's salaries from January 2020 is subject to the provisions of Rule 10(2) of the Labour Institutions (Mediation and Arbitration) Rules, GN. No. 64 of 2007. I should also clarify that, salaries that is not covered under the said limitation, should forthwith be paid to the applicant by the respondent from the date of this judgment while applicant is complying with the provisions of GN. No. 10(2) of GN. No. 2007(supra) to recover salaries from January 2020 to August 2023.

For all discussed hereinabove, I hereby confirm the CMA award and dismiss the application for want of merit.

Dated at Dar es salaam this 27<sup>th</sup> September 2023



B. E. K. Mganga  
**JUDGE**



Judgment delivered on 27<sup>th</sup> September 2023 in chambers in the presence of Charles Lugaila, Advocate for the Applicant and Bakari Juma, Advocate for the Respondent.



A handwritten signature in black ink, appearing to be "B. E. K. Mganga".

B. E. K. Mganga  
**JUDGE**