IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 154 OF 2023

BETWEEN

ABDALLAH SAID NJAVIKE ..... APPLICANT

AND

SAID SALIM BAKHRESA & CO LTD ..... RESPONDENT

JUDGEMENT

Date of last Order: *12/10/2023*
Date of Judgement: *27/10/2023*

MLYAMBINA. J.

The Applicant was employed by the Respondent as a Driver since 2013 until 2019 when he alleges to have been unfairly terminated from employment. The Applicant deponed in his affidavit that he was employed by the Respondent for transporting wheat from Tanzania to Rwanda and Burundi by using track with registration No. T939 CBW TYPE Benz and Trailer No. T.770 CBU type Selin. It was further stated that from 02/08/2019 to the date of instituting the complaint at the Commission for Mediation and Arbitration (herein CMA), the Applicant was denied access to work. Following such incident, he referred the matter to the CMA.

Before the CMA, the Applicant claimed for unfair termination both substantively and procedurally. He also claimed that the employer made

his working environment intolerable for him. He therefore prayed to be awarded 24 months salaries as compensation for the alleged unfair termination.

After considering the parties arguments, the CMA dismissed the Applicant's claims on the ground that the Applicant was not terminated from employment. Such decision aggrieved the Applicant. He therefore filed the present application urging the Court to determine only one ground:

> *Whether it was proper and legal for the honourable Arbitrator to dismiss the dispute on the ground that there was no letter for termination without regard to circumstances of constructive termination.*

The application proceeded by way of written submissions. Before the Court, the Applicant was represented by Mr. Benitho Mandele, learned Counsel. Whereas, Ms. Zainabu Salum, learned Counsel appeared for the Respondent.

Arguing in support of the application, Mr. Mandele submitted that the findings of the CMA are no correct because the unchallenged testimony and basis of the Applicant was all about constructive termination. He maintained that the Applicant was denied the

opportunity to work by prohibiting/barring him from signing in the attendance book from 02/08/2019 to the date of filing CMA F1.

Mr. Mandele went on to contend that the Arbitrator errored by failing to consider the fact that the Applicant was removed from the payroll without any termination letter. It was Mr. Mandele's submission that all the above scenario reveals and establish the circumstance of constructive termination which does not need proof of termination letter. To support his submission, he put reliance to the provision of *Rule 7(1) of the Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007* (herein GN. No. 42 of 2007). He also relied to the Court of Appeal case of **Kobil Tanzania Limited v. Fabrice Ezaovi,** Civil Appeal No. 134 of 2017 Court of Appeal of Tanzania at Dar es Salaam (unreported).

In response to the application, Ms. Salum submitted that the Arbitrator was right in law and facts for finding that the Applicant was not terminated because there was no evidence or a letter of termination. It was strongly submitted that the Respondent has never stopped, prevented or prohibited the Applicant from signing, reporting or not entering work premises. She added that all the Respondent's employees are in the biometric system. It was his view that the Applicant was

reporting and exiting workplace through punching machine. She also elaborated that the Applicant presented medical progressive report proving that he was sick.

As to the alleged constructive termination, it was strongly submitted that the Arbitrator was right in law and facts to determine that there was no constructive termination. She contended that the Applicant is the one who entered into an agreement with another driver (PW2) and he paid him salary as his assistant and sharing driving a car owned by Respondent without his consent. That, after the Respondent issued a letter to attend disciplinary hearing regarding a car found to be driven by non-employee. The Applicant submitted various hospital ED's and medical progress report indicating that he was advised to avoid prolong sitting, standing and avoid lifting heavy objects as evidenced by Exhibit S.3, S.4. and S.5.

Ms. Zainabu Salum went on to submit that the Respondent considered the Applicant's defense and implemented the doctor's advice. Thereafter, the Applicant was transferred to Azam Inland Container Depot (AICD) to drive a car from Dar es Salaam Port to AICD as alternative work but the Applicant did not report to work as seen in Exhibit S.6, S.7 & S.8. After the Applicant refused to report to Azam

AICD for two times, the Respondent called a meeting where the Applicant attended with his lawyer as per Exhibit S.8. The meeting was all about advisory not to construct or initiate termination against Applicant without obtaining consent of both parties. After the meeting, the Applicant was given two months' sick leave as stated at Paragraph 2 of page no.5 of the impugned Award. It was Ms. Zainabu Salum's reply that the Respondent complied with *Section 32(1) & (2) of ELRA as well as Rule 19(5) of GN No. 42 of 2007.*

It was further submitted by Ms. Zainabu Salum that the CMA Form No. 1 filed by Applicant indicates that the nature of dispute is termination of employment and the same was also testified by the Applicant. She submitted that the Applicant did not present any termination letter to justify the entitlement to all terminal remedies craved at CMA.

Ms. Zainabu Salum added that the Applicant did not submit any resignation letter to justify that he was forced to resign. That, there is no proof of grievance procedure taken by Applicant to justify that he was working under intolerable working condition. It was Ms. Zainabu Salum strong view that the constructive termination does not exist because the Applicant's reason for not working is illness and there is no

intolerable working condition imposed by the Respondent. To support her submissions, Ms. Zainabu Salum placed reliance to the Court of Appeal of Tanzania case between **Hamidu Abdallah Mbekae & 12 Others and Be Forward Tanzania Co Ltd**, Civil Appeal No. 380 of 2019 where it was held that *the principles of unfair termination do not apply to a specific task or fixed term contracts.*

It was argued by Ms. Zainabu Salum that the Applicant's contract was for fixed term of one year and not covered by the principles of unfair termination as it is the position in the cited case. On the basis of his submissions, Ms. Zainabu Salum urged the Court to uphold the CMA's Award and dismiss the application because the constructive termination allegation raised by Applicant was not found and justified.

After considering the rival submissions of the parties, CMA and Court records as well relevant laws, I find the Court is called upon to determine only one issue; *whether the Arbitrator was correct to find out that there was no constructive termination in this case.*

As rightly submitted by Mr. Mandele, the term constructive termination is provided under *Rule 7(1) (supra)* which provides as hereunder:

> Where an employer makes an employment intolerable which may result to the resignation of the employee, that resignation amount to forced resignation or constructive termination.

In the case of **Solid Doors (Pty) Ltd v. Commissioner Theron and Others**, (2004) 25 ILJ 2337 (LAC) quoted with approval in the case of **Kobil Tanzania** (supra), there are requirements established for a claim of constructive termination to stand. At para 28 of the referred decision, it was observed that:

> ... there are three requirements for constructive dismissal to be established. The first is that the employee must have terminated the contract of employment. The second is that the reason for termination of the contract must be that continued employment has become intolerable for the employee. The third is that it must have been the employee's employer who had made continued employment Intolerable. All these three requirements must be present for it to be said that a constructive dismissal has been established. If one of them is absent constructive dismissal is not established.

In line with the above cited decision, it is a cardinal principle of law that the intolerable conditions must result to the employee's

resignation as provided under *Rule 7(1) (supra)*. In the application at hand, there is no proof of the alleged termination. The Applicant narrated his story of how the Respondent made his working condition intolerable by not allowing him to go to work. However, thereafter he decided to absent himself from work which in my view such alone, cannot amount to resignation. As to the alleged intolerable conditions, I have critically examined the record and found that they are baseless. The record reveals that the Applicant was accused for allowing his assistant to drive his track without authorization from the Respondent. Following the accusations on 13/08/2018, the Applicant was summoned to a disciplinary hearing where he admitted the charges levelled against him and prayed for forgiveness. Thereafter, on 19/09/2018 the Applicant was transferred to AICD Operations (exhibit S6). After his transfer the Applicant did not report to work. Again, on 11/01/2019 the Applicant was reminded to report to work to his assigned station (exhibit S6).

The records show further that on 2019 the Applicant served the Respondent with medical reports (exhibit S5 collectively) which indicated that he was suffering from degenerative disc lumber region. Therefore, it was the Doctor's advice that the Applicant should avoid prolonged sitting/standing and lifting heavy objects.

Thereafter, on 16/01/2019 the Applicant through his Advocate served the Respondent his response to the transfer letter. He strongly disputed such transfer and demanded to be returned to his former station. After being served with the demand letter, the Respondent convened a meeting with the Applicant and his Advocate where the Applicant was advised to voluntarily resign from the employment considering his age and the doctor's advice. The Applicant refused the Respondent's offer. Following that, on 11/05/2019 the Applicant was given two month's sick leave (exhibit S11).

After resuming work from sick leave, on 16/07/2019, the Applicant again served the Respondent with another demand letter asking for the fate of his employment. Due to failure to get response from the Respondent, on 09/08/2019 the Applicant referred the matter to the CMA.

Therefore, on the basis of the above analysis, let alone that there is no termination in this case. The alleged intolerable conditions were not proved. As indicated above, the Applicant was transferred from one station to another and he unreasonably refused to attend to the newly assigned station, an allegation which, in my view, does not amount to intolerable conditions.

The decision in the case of **Solid Doors (supra)** is clear that the three established requirements for constructive termination must all exist for a claim to stand. To the contrary, in the case at hand, all requirements have missed. Thus, the Arbitrator was right to find that there was no constructive termination in the case at hand.

I have noted the Applicant's allegation that he was removed from the payroll without termination letter. In the circumstances of this case, it is my view that the Respondent was right to stop paying the Applicant his salary. He did not report to work from 19/09/2018 but he was still paid his salary up to July, 2019. Therefore, he cannot be paid salaries for the work not done. This is also the Court's position in the case of **Shabani Musa Para v. Scanad Tanzania Ltd**, Revision No. 355 of 2017, High Court of Tanzania Labour Division at Dar es Salaam (unreported).

Though not relevant in the matter at hand, the Court wish to comment to the Respondent's submission that principles of unfair termination do not apply to fixed term contracts as follows: The Court of Appeal's position in the referred decision has been expanded in range of decisions including the case of **St. Joseph Kolping Secondary School**

v. Alvera Kashushura, Civil Appeal No. 377 of 2021 where it was held that:

> We also do not agree with him that, under our laws a fixed term contract of service can be prematurely terminated without assigning reasons. This is because the conditions under section 37 of the ELRA are mandatory and therefore implicit in all employment contracts. It is only inapplicable to those contracts whose terms are shorter than 6 months. (See *Section 35 of the ELRA*).

The above position need not be overemphasized. The principles of unfair termination provided under *Section 37 of the ELRA* apply to all types of contracts be it permanent or fixed one. Thus, the Respondent's argument on such aspect lacks legal basis.

In the result, I hereby dismiss the application for lack of merits. Costs be shared. It is so ordered.

Y.J. MLYAMBINA

JUDGE

27/10/2023

Judgement pronounced and dated 27th October, 2023 in the presence of Counsel Rose Sanga for the Applicant and Zainab Salum for the Respondent.

Y.J. MLYAMBINA

JUDGE

27/10/2023