IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 194 OF 2023

BETWEEN

VIETTEL TANZANIA PLC ..... APPLICANT

VERSUS

JOHN BUBERWA ..... RESPONDENT

JUDGEMENT

Date of last Order: *30/10/2023*
Date of Judgement: *14/11/2023*

MLYAMBINA, J.

The facts from which this revision application are that; the Respondent was employed by the Applicant as a Value Added Service Officer in a fixed term contract of one year from 01/08/2018. It is alleged that the Respondent absconded from work from 14/03/2020 until when his employment term expired. The Applicant made several efforts to plead the Respondent to report back to work but in vain. Thereafter, the Applicant issued a notice of non-renewal of the contract to the Respondent on 03/07/2020. Then, the Respondent rushed to the Commission for Mediation and Arbitration (herein CMA) claiming for breach of contract and payment of unpaid salaries.

The Employment and Labour Relations Act [Cap 366 Revised Edition 2019] (herein ELRA) but he did not do so.

Mr. Maige submitted that the Arbitrator awarded the Respondent on the basis that the Applicant did not take any action against the Respondent when he absconded himself for four months. He argued that disciplinary action against the Respondent could not be taken because he was not reporting to work.

It was argued by Mr. Maige that; as per *Section 32(3)(a) (supra),* it is the mandatory requirement of the law that the employee is entitled to be paid sick leave if he submits the medical report issued by a registered medical practitioner. Therefore, in this case the Respondent was not paid his salary because he did not submit his medical report as required. That, the Applicant requested the medical report from the beginning of the Respondent's sickness, however, the same was not submitted as stated by the Arbitrator at page 5 paragraph 3 of the impugned Award.

Regarding the second ground, it was submitted that the Arbitrator failed to determine the second framed issue. That, she awarded the Respondent without considering the provision of *Section 32(2)(a) and 32(3)(a) of the ELRA (supra).* It was submitted that at page 10 paragraph 3 of the impugned Award, the Arbitrator clearly stated that

the Respondent did not bring evidence to prove his sickness but he proceeded to award him the claimed salaries. As to the requirement of submitting medical report, Mr. Maige referred the Court to the case of **Abdul – Karimhaji v. Raymond Nchimbi Alois Joseph Sita Joseph** (2006) TLR 420 cited in the case of **Cocacola Kwanza Ltd v. Rogers Kiganzi**, Revision No. 784 of 2018 (unreported) where it was held that:

> It is elementary principle that who alleges is the one responsible to prove his allegation.

Mr. Maige maintained that the reason for withholding the Respondent's salary was justified because he failed to submit the medical certificate proving that he was sick. In the upshot, Mr. Maige urged the Court to quash and set aside the CMA's Award.

As regards to the first ground, it was in reply submitted by Mr. Zake that there is nowhere in the CMA's record the Respondent claimed to fail to attend to work because of sickness. Thus, the burden of proof cannot be shifted to him. Mr. Zake stated that such allegation was tabled by the Applicant through his witness (DW1) as stated at page 8 of the contested decision. It was further submitted by Mr. Zake that there is no proof that the Applicant requested the medical certificate and that the Respondent failed to produce the same. He also relied to the principle

and not four months as awarded by the Arbitrator. Hence, he urged the Court to dismiss the application with costs for lack of merit.

Rejoining the application, Mr. Maige reiterated his submissions in chief. He added that the issue of sickness is reflected in the proceedings as testified by DW1. He said the Respondent did not challenge such evidence. He maintained that the Respondent was supposed to submit his medical report to prove his sickness. As to the requirement of *Section 28 (1) (a) (b) (supra),* it was submitted that the referred provision does not fit in the circumstance of this case. That the issue before the Court is payment of salary while the referred provision is for withholding salary. He again pleaded the Court to quash and set aside the CMA's decision.

After considering the rival submissions of the parties, CMA and Court records as well as relevant laws I find the Court is called upon to determine only one issue; *whether the Arbitrator rightly awarded the Respondent.*

As pointed out herein above, at the CMA the Respondent claimed to be paid nine months salaries as compensation for the remaining period of the contract founded on breach of contract. In the contested decision, the Arbitrator found that there was no breach of contract in

this case. The Respondent's contract ended upon expiry of the agreed period. Notwithstanding such finding, the Arbitrator awarded the Respondent four months unpaid salaries. This is reflected at page 10 of the decision where it was stated as follows:

> Hoja ya pili ni haki za kila upande. Madai mengine ya mlalamikaji ni mshahara wake kipindi alipokua akiumwa. Kwamba mlalamikaji hakufika kazini kwa muda wa miezi minne akidai kuwa alikuwa anaumwa. DW1 amekiri kwenye Ushahidi wake kwamba, kipindi chote alichokuwa nje akiwa anaumwa kwa miezi minne hawakumlipa mishahara yake na alidai kuwa mlalamikaji angeleta vithibitisho vya ugonjwa wake angelipwa hiyo mishahara, lakini mlalamikaji hakupeleka vithibitisho vya kuumwa kwa muda wa miezi minne na hata hapa mbele ya Tume hakuna Ushahidi huo. Ila Tume hii inajiuliza mwajiri alichukua hatua gani kwa mlalamikaji kutofika kazini kwa muda wa miezi minne bila kuleta uthibitisho?

The above quotation can be loosely translated as follows:

> The second issue is the relief of the parties. Another claim by the complainant is his salary during the time he was sick. That, the Complainant did not go to work for four months alleging that he was sick. DW1 has admitted in his evidence that during the period he was out sick for four months, they did not pay his salaries and claimed that the Complainant would have brought

proof of his illness, he would have been paid the salaries, but the Complainant did not send the evidence of the illness for four months even here before the CMA there is no evidence of that. But the CMA asks what action did the Employer take for the Complainant not to arrive at work for four months without bringing proof?

The Arbitrator further relied to the case of **Bozert Omolo v. Security Group (T) Limited** [2015] LCCD 137 where it was held as follow:

> Also, I am mindful of what Respondent's administrative officer alleged that they withheld Applicant salary because Applicant absconded from work from 15/04/2011 until 13/09/2011 when he delivered his resignation letter. I asked myself how comes an employee abscond from work for four months without employer taking any action? Indeed, this is not right; the employer cannot come forward and withhold his employee salary without taking any action on such alleged misconduct. It is the finding of this Court Applicant is entitled to four months unpaid salaries i.e salary for the month of June, July, August and September, which were, withhold by Respondent. In the end result I find this application to have no merit and dismiss it save for the unpaid salaries granted to the Applicant.

On the basis of the above decision, the Arbitrator awarded the Respondent four months salaries because the Applicant did not take any action against the Respondent when he was out of work for all the alleged period.

Before the Court, the Applicant strongly disputes such finding. Mr. Maige submitted that there was no any disciplinary action against the Respondent because he was out of work. I disagree with Mr. Maige's submission for being contrary to the provision of *Rule 13(6) of the Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007 (herein GN. No 42 of 2007).* As per *Rule 13(6) (supra),* an employer is empowered to proceed with disciplinary hearing in absence of the employee where the employee unreasonably refuses to attend. Thus, in this case the Applicant was at liberty to proceed with disciplinary hearing, if he followed the procedures stipulated under *Rule 13 of GN. No. GN. No. 42 of 2007.*

The Arbitrator awarded the Respondent on the ground that he was sick. Going through the records, I join hands with Mr. Maige that there is no proof of the alleged sickness. An employee who is entitled to be paid his salaries while he/she is sick is the one who is in sick leave pursuant to *Section 32 of the ELRA (supra).* In the case at hand, as correctly

submitted by Mr. Maige, there is no proof that the Respondent was on sick leave. No medical report has been submitted to prove the alleged sick. Hence, he cannot be protected by *Section 32 (supra)*.

It should be noted that, it is the Court's position set forth in various decisions that each case will have to be decided on its own peculiar surrounding circumstances. This was also stated in the case of **Waziri Amani v. Republic** [1980] TLR 250. In employment contracts, both parties, employer and employee have obligation to perform. The duty of the employee, among others, is to perform his responsibilities as they are stated in the job description or employment contract. On the other hand, the employer *inter alia* to pay the employee remuneration for the work he/she has done. In the instant matter, as the records speaks, the Respondent claimed for the salaries for the months in which he was out of work.

The Applicant notified the Respondent to report back to work through a letter (exhibit P3), where the Respondent in his testimony admitted that he received the said letter. This is reflected at page 10 of the CMA written proceedings. I hereunder quote the Respondent's testimony on his own verbatim:

Naomba nitoe kielelezo cha barua niliyoandikiwa na mwajiri ipokelewe kama kielelezo kuhusu kurudishwa kazini ili kusuluhisha mgogoro wa mshahara

Mwakilishi wa mlalamikiwa: sina pingamizi

Tume: Napokea barua hiyo kama kielelezo "P3"

The Respondent further testified that, after receipt of exhibit P3, he reported at work on 12/03/2020. When he reported back, the discussion between him and the employer was not centred at what he was informed in exhibit P3 to resolve the remunerations/salary and contract misunderstandings. He was terminated due to absenteeism. I hereunder quote the Respondent's testimony on his own verbatim:

Niliripoti tarehe 12/03/2020 nilizungumza nae akaniambia sina kazi tena kutokana na utoro hivyo hatukuzungumzia kile walichoniitia kwa mujibu wa barua yao ya P3.

Baada ya hiyo tarehe 12/03/2020 hakuna utaratibu wowote uliofanywa na mwajiri nilichukua vitu vyangu nikarudi zangu nyumbani.

The Respondent testified that he was terminated on the date he reported back to work. The testimony which is questioned by the Court. If the Respondent was truly terminated on the alleged date, why he waited for so long to refer his complaint at the CMA? He testified to be

terminated on 12/03/2020, while the matter was referred to the CMA on 12/08/2022. The record is silent as to what prompted the Respondent to file the complaint after two years and five months. The complaint before the CMA was accompanied by the application for condonation where the Respondent stated that the reasons for his lateness was spending time in Court seeking for justice and that he was preparing for documents.

I will not go through as to whether the alleged reasons were genuine or not because the parties did not dispute the grant of condonation at the CMA. However, on the basis of the Respondent's evidence, it was of paramount importance to examine if he was terminated on the alleged date.

On his part, the Applicant still considered the Respondent as his employee. The Applicant served the Respondent with a notice of non-renewal of the contract (exhibit D4) on 03/07/2020. In my view, through such notice, the Applicant still recognized the Respondent as his employee despite the fact that the Respondent was not attending at work anymore. Therefore, on the basis of the narrated circumstances of this case, it is my view that the Respondent is not entitled to the salaries claimed on the following reasons:

First, as rightly found by the Arbitrator there is no breach of contract in this case. The Respondent's contract ended upon expiry of the agreed period.

Second, I find that the Respondent decided not to go to work on his own whims despite of the employer's effort to notify him to return back to work (exhibit P3). Therefore, he cannot benefit from his own wrong by receiving salaries for the work he has 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 Labour Division at Dar es Salaam (unreported).

Third, both parties did not fulfil their obligations conferred by the law. Thus, only one party cannot be punished and the other party be left enjoying at the expense of the other. It is my view that both parties, the employer and employee have to suffer consequence of their actions.

I am not in disregard of Mr. Zake's submission that the employer is only allowed to deduct the employee's salaries pursuant to the provision of *Section 28 of the ELRA (supra)*. The provision was correctly distinguished by Mr. Maige, that such provision concerns about deduction of salaries which is not the position in this case. In the matter

at hand, the Respondent's salary was withheld in total and not deducted as claimed.

In the premises, on the basis of the evidence on record it is my view that the Respondent is not entitled for the salaries awarded by the Arbitrator. Consequently, the CMA's award is hereby quashed and set aside.

It is so ordered.

Y.J. MLYAMBINA

JUDGE

14/11/2023

Judgement pronounced and dated 14th November, 2023 in the absence of the Applicant and in the presence of the Respondent in person.

MAHAKAMA KUU YA TANZANIA (The High Court of Tanzania) (Labour Division) DIVISHENI YA MAHAKAMA YA KAZI

Y.J. MLYAMBINA

JUDGE

14/11/2023