IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

LABOUR REVISION NO. 11134 OF 2024

CASE REFERENCE NO. 202405151000011134

BETWEEN

MUSTANSIR GULAM HUSSEIN TRADING AS
PKF ASSOCIATES TANZANIA ..... APPLICANT

AND

GILBERT VALENTINE ..... RESPONDENT

JUDGEMENT

Date of last Order: *20/06/2024*
Date of Judgement: *27/06/2024*

MLYAMBINA, J.

Briefly, the application emanates from the decision of the Commission for Mediation and Arbitration (herein CMA) in *Labour dispute No. CMA/DSM/ILA/817/20/436/20* delivered on 12/04/2024 by Honourable NGWASHI Y, Arbitrator. In the referred decision, upon finding that the Respondent was constructively terminated as well as discriminated, the Arbitrator awarded him a total of TZS 46,692,307.7/= being, two months salaries for the month of August and September 2020, 24 months salaries as compensation for the alleged unfair termination, TZS 10,000,000/= as compensation for discrimination, salaries for the days worked in October 2020, severance payment of four years, three months salaries in lieu of

notice as well as a certificate of service. Aggrieved by the CMA's decision, the Applicant filed the present application on the following grounds:

i. That, the Honourable Arbitrator erred in law and fact for holding that the Respondent submitted little ride receipts on time without clear evidence from the Respondent, and disregarding the Applicants' testimonial that the Respondent failed to submit little ride receipts within the required time.

ii. That, the Honourable Arbitrator erred in law and fact by assuming that failure of DW2 to reply the Respondents' email confirms that the Respondent submitted little ride receipts on time and disregard DW1 and DW2 testimonial that the Respondent submitted little ride receipts out of time.

iii. That, the Honourable Arbitrator erred in law and fact in holding that continued employment became intolerable for the Respondent on the reason that his salary was withheld while the testimony before the trial indicate that the Applicant agreed to pay his withheld salary and no evidence which shows that his salary continued to be withhold.

iv. That, the Honourable Arbitrator erred in law and fact for holding that no action was taken against Lilian, Bertha, Elton and Daud and disregard DWI and DW2 testimonial during the trial that, Lilian, Elton and Dauds' salaries were withheld the same as the salary of the Respondent.

v. That, the Honourable Arbitrator erred in law and fact for holding that Respondent was discriminated on the reason that no action was taken against Lilian, Bertha, Elton and Daud while the Applicant's evidence indicate that action was taken against Lilian, Elton and Daud as their salaries were withheld.

vi. The Honourable Arbitrator erred in law and fact for failure to evaluate the evidence adduced by the Applicant' s witnesses.

vii. That, the Honourable Arbitrator erred in law and fact for ordering excessive compensation of 24 months salaries for unfair termination without any legal justification.

viii. That, the Honourable Arbitrator erred in law and fact for ordering excessive compensation of 24 months salaries for unfair termination while the Respondent never claimed for unfair termination in CMA Form No. 1.

ix. That, the Honourable Arbitrator erred in law and fact for ordering compensation of discrimination amounting to TZS 10,000,000/= while the claim of discrimination was not proved.

x. That the Honourable Arbitrator erred in law and fact by shifting the onus of proof to the Applicant on the alleged claims of the Respondent under CMA Form No 1.

xi. That, the Honourable Arbitrator erred in law and fact for ordered payment of severance pay for four years while the Respondent only worked for one year.

xii. That, the Honourable Arbitrator erred in law and fact to determine the dispute in favour of the Respondent without considering the arguments and evidence of the Applicant.

xiii. That, before the Commission for Mediation and Arbitration, the following three issues were agreed and recorded:

a. Whether Applicant made employment intolerable that cause the complainant to end employment contract

b. Whether the complainant was discriminated at work

c. To what reliefs are the parties entitled to.

xiv. That, during hearing, the Respondent failed to adduce evidence which indicates intolerable employment environment made by Respondent which caused him to end the employment contract by resigning. On the other hand, the Applicant through her witnesses namely Rebecca and Raphael adduced before the Commission that the Applicant did not make employment intolerable for the Respondent including withholding of the salaries, rather the Respondent resigned with reasons best known to him. The Applicant's witnesses stated further that, the Respondent's fellow employees Lilian, Elton and Daudi received their salaries, upon submitting the receipts but the Complainant rejected his salaries and instead he resigned.

xv. That, in addition to the above, the Respondent failed to testify on the allegation of discrimination. Further, the Applicant's witnesses testified to the effect that there was no discrimination since the Applicant's salary was not the only salary was withheld by the Applicant.

xvi. That, on 12th April 2024 the Commission issued an award in favour of the Applicant, declaring that, the Respondent was discriminated and his employment became intolerable.

xvii. That, the Applicant being aggrieved with the above-mentioned award of the Commission in *CMA/DSM/ILA/817/20/436/20* delivered by Honourable NGWASHI Y., lodged in the Commission for Mediation and Arbitration a CMA Form No. 10 a notice of intention to seek for revision of an award.

The application proceeded by way of written submissions. Before the Court the Applicant was represented by learned Counsel Mr. Nasri A. Hassan, and Mr. Antipas Lakam, learned counsel appeared for the Respondent.

Arguing for the application, Mr. Hassan consolidated grounds number ii, ii, vi and xii and submitted that the Honourable Arbitrator erred in law and fact in holding that the Respondent submitted the receipts on time without proper justification. That, the Arbitrator disregarded the Applicant's witnesses who testified clearly that the Respondent did not submit little ride receipts within the required time. He elaborated that the evidence of DW1 and DW2 proves that the Respondent delayed to submit the little ride receipts. He added that even the email conversation of 02/10/2020 (exhibit G3), relied by the Arbitrator, proves that the receipts in question were not submitted in time as directed. Therefore, the Applicant rightly withheld the Respondent's salaries.

In response, Mr. Lakam submitted that exhibit G3 proves that the Respondent submitted the receipts in question timely. He stated that the receipts were submitted via Mr. Raphael Mabruki who did not respond to the Respondent's emails. It was strongly submitted that the Applicant had no justifiable reason to hold the Respondent's salary. He therefore

contravened violating *Sections 28(1)(b) and 28(2) of the Employment and Labour Relations Act [Cap 366 Revised Edition 2019]* (herein ELRA).

After going through the records, I have noted that due to eruption of covid 19 in 2020, as a means of protecting his employees from infection, the Applicant decided to provide transport to his employees. Therefore, the Applicant deployed the use of little ride transport to transport his employees from their residence to work place and vice versa.

It was also agreed that every employee had the duty to submit receipts of transport so as transport costs can be processed and paid to little ride. It is the Applicant's allegation that the Respondent delayed to submit the receipts despite of extension of time. That for the month of May and June 2020 the employees were supposed to submit their receipt by 30th July 2020. Since a large number of employees failed to met the deadline, the time was extended up to 15th August 2020. Therefore, since payment to little ride were already processed, the Applicant decided to withhold Respondent's salaries for the month of August and September.

The CMA found that as per the email correspondences (exhibit G3), the Respondent insisted to have retired the receipts timely to DW2 and DW2 never responded to those emails thus the Arbitrator concluded the receipts were timely submitted. The email relied by the Arbitrator was

that of 17th September 2020 at 8:01am where the Respondent stated as follows:

> I failed to come to my work station today because I missed bus fare.
> It should be understood that though delay had occurred in submitting Little ride expenses but it was not my fault as I was instructed by line manager to concentrate in finalising the audits and file closure as he will take responsibility.
> I request you to release my salary as I depend on salary to satisfy in basic needs including transport expenses to work station.

On the basis of the above email, it is my view that had the Arbitrator considered the whole content of the email in his decision, she would have reached to a different conclusion. In his own quoted words above, the Respondent admitted that he delayed to submit the receipts in question. He further stated the reason for the delay, which in my view, does not change the fact that he delayed to submit the receipt timely as directed. The fact that the Respondent's emails were not responded is not a concluding factor that he submitted the receipts timely, other evidence on record ought to have been considered.

Again, there is no dispute that the Applicant's salary was withheld. *Section 28 (supra)* provides as follows:

28.-(1) An employer shall not make any deduction from an employee's remuneration unless—

(a) the deduction is required or permitted under a written law, collective agreement, wage determination, Court order or arbitration award; or

(b) subject to subsection (2), the employee in writing agrees to the deduction in respect of a debt.

In the application at hand, the Applicant violated the above provision by withholding the salary. There was no agreement in writing from the employee consenting to be deducted his salary in case he defaulted to submit the receipts at issue. Thus, the salary was unlawful withheld by the Applicant.

Furthermore, even if the Respondent was to pay the transport expenses by himself for the delay to submit the receipts, withholding his all salary was unreasonable. The punishment was too severe and the Applicant showed no remorse in addressing the Respondent's claim. He simply replied to him that if he had no fare to come to work, he can resign. Under such circumstances, it is my view that the Applicant created the intolerable working condition for the Respondent which leaved him with no other option than to resign. In the case of **Peter Rwegasira v.**

Northern Engineering Works Ltd, Revision Application No. 403 of 2022 at page 13 it was held that:

> withholding someone's payment which is important for his survival create intolerable condition of work.

It was Mr. Hassan's submission that the guidelines or questions which the Court or commission must consider in deciding the cases of constructive termination were well provided in the case of **Girango Security Group v. Rajabu Masudi Nzige**, [2014] LCCD 40 which was referred by this Court in the case of **Yaaqub Ismail Enzron v. Mbaraka Bawaziri Filling Station**, Revision No. 33 of 2018 at page 12 as follows:

> "i) Did the employee intend to bring the employment relationship to an end? (ii) Had the working relationship become so unbearable, objectively speaking, that the employee could not fulfil his obligation? (iii) Did the employer create the intolerable situation? (iv) Was the intolerable situation likely to continue for a period that justified the termination of the relationship by an employee? (v) Was the termination of the employment contract the only reasonable option open to the employee?

Further, he cited the case of **Murray v. Minister of Defence** which was referred by this Court in the case of **Yaaqub Ismail Enzron** *(supra),* by stating as follows:

In proving constructive termination, the resigned employee has to prove that termination was the only option available and no other alternative.

Applying the cited principles in the case at hand, the Respondent had no intention to resign that is why he kept on asking for his salaries as evidenced by exhibit G3. It was the Applicant who created the intolerable condition and had no any other option offered to the Respondent and kept on harassing him to resign. On the basis of the above analysis, it is my view that the termination in this case was constructive, hence unfair termination as rightly found by the Arbitrator.

Regarding grounds iv, v and ix, Mr. Hassan submitted that the CMA Award at page 13 provides that the Respondent submitted his receipts together with Lilian, Bertha, Elton, and Daudi. In that juncture, there were certainly males and females who submitted receipts out of time together with Respondent. He added that, DW1 and DW2 confirmed that Lilian, Bertha, Elton, and Daudi together with the Respondent submitted receipts out of time. On such analysis, the counsel argued that it is certain that not only females whose salaries were withheld and later on released but also Elton and Daudi who are male employees. On such basis, the counsel strongly challenged the Arbitrator's findings that the

Respondent was sexually discriminated in terms of *Section 7 of the ELRA (supra).*

In support of his position the Applicant's counsel relied to the case of **Higher Education Students Loan Board v. Yusufu M. Kisare** (consolidated Revision No. 755 of 2018 & 258 of 2018, High Court Labour Division, Dar es Salaam where Aboud J, at page 26 defines sexual harassment as follows:

> ...Unwelcomed behavior of a sexual nature. It can be written, verbal, or physical. Sexual harassment can include someone touching, grabbing, or making other physical contact with someone without his or her consent.

In response, counsel Lakam submitted that the Respondent's claim of discrimination is supported by evidence that Lilian and the Respondent, under the same line Manager, submitted their Little Ride receipts on the same day, yet Lilian was paid her salary while the Respondent was not paid. He stated that the burden of disproving the discrimination was shifted to the Applicant, as provided under *Section 7(8) of the ELRA (supra).* He also relied on the case of **Konrad Kambona v. Tanga Cement Co. Ltd** [2013] LCCD152.

It is my view that this ground of discrimination is in relation to the above decided ground. Since it is found that the Respondent submitted his receipts late, then the allegation of discrimination cannot stand. There

is no evidence on record to prove that the said Lilian also submitted his receipts on the same date as the Respondent did. In his own testimony, the Respondent admitted that he delayed submitting his receipts together with Lilian, Bertha, Elton and Daudi but he was the only employee whose salaries were withheld. Looking at the mentioned names they were definitely boys and girls, therefore the allegation regarding gender discrimination cannot stand. In the premises, the Arbitrator's findings on such aspect is faulted.

Turning to the last ground as to reliefs awarded, it was counsel Hassan's submission that the Arbitrator awarded what was not pleaded in CMA form No. 1 by the Respondent. That, he did not pray for compensation of 24 months' salary but surprisingly the same was granted to him contrary to the law. He supported his submission with the case of **Dalbit Petroleum Co. Ltd v. Munira Hapendeki**, Revision Application No. 311 of 2021 on page 11 referred to the case of **Melchiaded John Mwenda v. Gizzele Mbaga** which states that:

> It is elementary law which is settled to our jurisdiction that the Court will grant only a relief which has been prayed.

The Applicant's submission should not detain me. In the CMA F1, the Respondent prayed for compensation of 72 months salaries. The Arbitrator found the same to be excessive. He reduced the same to 24

months. Therefore, the award of compensation was pleaded in the CMA F1. However, since it is found that the Respondent also failed to discharge his duties as required, he partly contributed to his termination. I find the compensation of 24 months is excessive and the same is reduced to 12 months salaries.

As for the payment of two months withheld salaries for the month of August and September 2020, the Court finds no reason to fault the same. The Applicant unlawfully upheld such salary and he must pay it back to the employee.

Turning to the award of TZS 10,000,000/= as compensation for discrimination, the same is hereby quashed because it is found that there was no discrimination in this case. The award of salaries for the days worked in October 2020 are not challenged and they were rightly awarded by the Arbitrator, hence, confirmed.

Coming to the award of three months salaries in lieu of notice, the same is also confirmed by the Court pursuant to *clause 15 (a) of the employment contract (exhibit G2).*

Lastly, as for the payment of four years severance pay, counsel Hassan submitted that the Arbitrator wrongly awarded the same because the Respondent worked with the Applicant for only one year and half from January 2019 to October 2020. Hence, contrary to *Section 42 (1) of*

the ELRA (supra) which requires the employee to get severance pay of 7 days salary for each completed year. As rightly submitted by counsel Hassan, as per the employment contract (exhibit G2) the employment relationship with the parties herein commenced on January 2019 and the same ended on 15/10/2020 after the Respondent tendered resignation letter (exhibit G4). On such basis, the Respondent completed only one year with the Respondent. He is therefore, entitled to the severance pay of one year equal to TZS 323,076.92.

In the result, I find the present application has partly succeeded. For the reasons and calculations made above, the Applicant is ordered to pay the Respondent the total of TZS 21.323.076.92 and a certificate of service. The CMA's award is hereby revised to the extent explained herein above. It is so ordered.

Y.J. MLYAMBINA
JUDGE
27/06/2024

Judgement pronounced and dated 27th June, 2024 in the presence of Counsel Lucy Kiangi for the Applicants and the Respondent in person. Right of appeal explained.

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

Y.J. MLYAMBINA
JUDGE
27/06/2024