IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

(LABOUR DIVISION)

AT DAR ES SALAAM

LABOUR REVISION NO. 2583 OF 2024

CASE REFERENCE NO. 20240210000002583

VALENTINA MADAWA ..... APPLICANT

VERSUS

ARAFA MAJUMBASITA DISPENSARY ..... RESPONDENT

JUDGEMENT

Date of last Order: *12/04/2024*
Date of Judgement: *10/05/2024*

MLYAMBINA, J.

The instant Labour Revision application is premised on the following issues:

i. Whether it was proper and justifiable for the learned Arbitrator to ignore the Applicant's evidence which clearly shows and indicates intolerable environment faced by the Applicant.

ii. Whether it was proper and relevant for the Commission to ignore granting reliefs prayed for in the Applicant's CMA F1.

iii. Whether it was justifiable for the Commission to reach the findings that the Applicant' s claims were not specific contrary to the law.

The application proceeded by way of written submissions. Before the Court, the Applicant was represented by Counsel Sylvanus Mayenga. On

the other hand, the Respondent enjoyed the services of Counsel Bevery B. Lyabonga.

On the first ground, Mr. Mayenga submitted that it was improper and unjustifiable for the CMA to hold that the Applicant failed to prove constructive termination without taking into consideration the circumstances which necessitated resignation. He stated that there were continuous extraordinary and serious offending conducts by the employer which resulted to fundamental breach of employment. He stated the following circumstances which necessitated the Applicant's resignation:

i. Employer's failure to pay annual leave which was well admitted by the Respondent in the proceedings while cross examined.
ii. The Applicant being subjected to many night shifts as per the staff duty roster which was admitted as "exhibit A3" at the CMA for instance, August 2022 where, the Applicant attended 15-night shifts more days compared to other Employees.
iii. Non-payment of overtime allowance contrary to the terms of Contract which was verbal.
iv. Respondent's reluctant behaviour from responding to the Applicant's correspondence.

In further support of the claim, Mr. Mayenga referred the Court to the case of **Peter Rwegasira v. Northern Engineering Works Ltd**, Revision Application No. 403 of 2022 at page 13 where it was held that:

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

In response, Ms. Lyabonga strongly disputed the Applicant's claims. She urged the Court to dismiss the application.

In the light of the afore submissions, it has to be taken into account that *Rule 7(1) of the Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007 (herein GN 42 of 2007)*, defines constructive termination as it is hereunder provided:

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

The word intolerable was defined in the **South African case of Solidarity on behalf of Van Tonder v. Armaments Corporation of SA (SOC) Ltd and Others**, (2019) 40 ILJ 1539 (LAC) at page 39 as follows:

> ... The word 'intolerable' implies a situation that is more than can be tolerable or endured; or insufferable. It is something which is simply too great to bear, not to be put up with or beyond the limits of tolerance ...

Again, the Court of Appeal in the case of **Kobil Tanzania Limited v. Fabrice Ezaovi,** Civil Appeal No. 134 of 2017 (unreported) at page 17-18 while interpreting the above provision of the law the Court set standards required in proving constructive termination by making reference in the case of **Solid Doors (Pty) Ltd v. Commission Theron and Others**, (2004) 25 ILJ 2337 (LAC) at para28, it was observed:

> .... there are three requirements for constructive dismissal to be established:
>
> i. That the Employee must have terminated the contract of employment.
> ii. The reason for termination of contract must be that continued employment has become intolerable for the employee.
> iii. It must have been the employee's employer who had made continued employment intolerable.

As it was held in the case of **HC Heat Exchangers (Pty) Ltd v. Victor J L De Araujo & 2 Others,** Case No. JR 155/16 cited in the case of **Kobil Tanzania Limited** (supra), it is the duty of the employee to prove the existence of the intolerable conditions where it was held that:

> The onus to prove the existence of intolerability rests squarely upon the shoulders of the employee party. The subjective view of the employee is of no consequence in discharging this onus,

as the inquiry to establish whether intolerability exists is always an objective one.

Generally, the Applicant's intolerable conditions was based on the Respondent's failure to pay the Applicant her employment benefits to wit, overtime allowances and annual leave. Going through the records, it is revealed that the Applicant had claims against the Respondent and the same were not paid nor addressed. Starting with the claim of annual leave, it is the requirement of the law provided under *Section 31 of the Employment and Labour Relations Act* that the employer should grant an employee occasional paid leave. The provision provides as follows:

> 31.-(1) An employer shall grant an employee at least 28 consecutive days' leave in respect of each leave cycle, and such leave shall be inclusive of any public holiday that may fall within the period of leave.
>
> (2) The number of days referred to in subsection (1) may be reduced by the number of days during the leave cycle which, at the request of the employee, the employer granted that employee paid occasional leave.

In the application at hand, there is no dispute that the Applicant was allowed to take her annual leave, but there is no proof that she was paid in any of the annual leave taken. Even DW1 when testifying before the CMA,

admitted that they did not pay the Applicant in any of the leave taken. Under such circumstance, the Applicant was forced to take unpaid leave. This is evidenced by the leave request forms (exhibit D3 collectively) when the Applicant was forced to sign agreeing that she accepted unpaid leave.

Regarding the claim of being subjected to many night shifts, the Applicant tendered a letter addressed to the Respondent (exhibit A4). In the referred letter, the Applicant demanded the Respondent to reduce her night shifts and working hours from 12 hours to 8 hours as previously agreed in the oral employment contract. As per exhibit A3 collectively (the Staff Duty Roster), for the month of July 2022, the Applicant was assigned 8 nights, for the month of August, 2022, the Applicant had 15 nights and for the month of September, 2022 the Applicant had 4 nights.

Looking at the above trend, it is my view that the Applicant was subjected to many night shifts which she was entitled payments thereof. Again, on this claim the Respondent also failed to prove that the Applicant was paid extra allowances for being subjected to many night shifts. Thus, since her claim was not addressed by the Respondent, she had no any other option than to terminate the contract through resignation.

Furthermore, the Applicant also stated that the Respondent had reluctant behaviour from responding to Applicant's correspondences. This claim is in relation to all the claims the Applicant had against the Respondent. However, if there is no proof that the Applicant's claims were considered by the Respondent, then the Applicant proved her claims. Additionally, in the termination, the Applicant stated the claims which necessitated her termination and the Respondent did not bother to address or respond the same. Thus, the Respondent knew the claims in question were true. The Applicant also tendered her bank statement (exhibit A1) to prove that she was not paid her claims. On their part, the Respondent did not tender any evidence to counter or dispute the claims in question. Thus, the Applicant proved her claims.

I further subscribe to the findings in the case of **Peter Rwegasira** (supra) that failure to pay the employee her employment benefits create intolerable condition which results to termination. It has to be noted that remuneration is one of the crucial aspects in motivating, attracting and attaining employees. Once employees are well paid, it attracts productivity.

On the basis of the foregoing analysis, it is my findings that the Applicant proved the intolerable conditions. Hence, there was unfair termination in this case. The Arbitrator's decision is hereby faulted.

On the second ground, Mr. Mayenga submitted that through CMA F1 the Applicant claimed for TZS 600,000=/ for two months being unpaid salaries, TZS 32.400,000 being unpaid annual leave, TZS 620,000/= being overtime, TZS 46,800,000=/ being salaries for remaining 13 years plus compensation of 24 months plus severance pay.

As regards to the claim of two Months unpaid salaries, it was Mr. Mayenga's submission that the Applicant was not paid the same. He stated that the claim was not disputed by the Respondent by tendering salary slips as per Section *15(5) of the ELRA* which requires an Employer to keep record of an employee and prove its existence. To booster his submission, Mr. Mayenga cited the case of **MIC Tanzania Ltd v. Imelda Gerald** (Civil Appeal No. 186 of 2019) (20221 TZCA 1-tl at page 13-14 where the Court while making reference to the case of **Goodluck Kyando v. Republic**, Criminal Appeal No. 218 of 2003 (unreported), the Court went on saying that, every witness is entitled to credence and whoever questions the credibility of a witness must bring cogent reasons beyond mere allegations.

Regarding payment of annual leave and overtime, Mr. Mayenga submitted that the Applicant is entitled for the same as per *Section 31(4) of the ELRA*. Ms. Lyabonga on the other hand strongly disputed the Applicant's claims.

Since it is found that there was unfair termination in this case, it is my view that the Applicant is entitled to the remedies of unfair termination. The parties had unspecified period of contract. Therefore, considering the fact that the Applicant had unpaid benefits to wit leave allowance and overtime allowances, the same are granted. The Applicant worked for 7 years. Thus, he is entitled to leave payment for all the years worked equal to TZS 2,100,000/=. The Applicant is also granted unpaid salaries for two months, TZS 600,000/= and an overtime allowance amounting to TZS 620,000/=. Since the Applicant was unfairly terminated, it is my view that the Award of 24 months salaries will suffice justice in the circumstance. The Applicant's salary was TZS 300,000/= times 24 months, which is equal to TZS 7,200,000/=.

In the result, the present application is granted on merit. Consequently, the CMA's Award is hereby revised and set aside. The Respondent is ordered to pay the Applicant the total of TZS 10,520,000/= in the calculations specified herein above.

It is so ordered.

Y.J. MLYAMBINA

JUDGE

10/05/2024

Judgement pronounced and dated 10th May, 2024 in the presence of the Applicant in person and Counsel Bevery Lyabonga for the Respondent. Right of appeal explained.

Y.J. MLYAMBINA

JUDGE

10/05/2024