

IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT SONGEA

LABOUR REVISION NO. 03 OF 2020

HUSSEIN MUSSA MSENYESI 1ST APPLICANT

SELEMANI ISMAIL 2ND APPLICANT

VERSUS

TSN LOGISTIC COMPANY LTD..... RESPONDENT

JUDGMENT

Date of Last Order: 08/09/2020

Date of Judgment: 20/10/2020

BEFORE: S. C. MOSHI, J

The Applicants (Employees) herein filed an application for Revision against TSN LOGISTIC COMPANY LTD (Employer) in respect of the commission for mediation and Arbitration (C.M.A) award dated 17th March 2020. The application was supported by an affidavit which was deposed by Hussein Mussa Msengesi whereas the respondents

opposed the application and they filed a counter affidavit which was sworn by Mr. Musa Msele who is respondent's principal officer.

The grounds for the application as advanced by the applicants in the affidavit are thus: -

(i). That, the Commission for Mediation and Arbitration erred in law and facts to hold that, the applicants themselves terminated their service.

(ii). That, the Commission for Mediation and Arbitration erred in law and facts to decide the matter contrary to the evidence in record.

(iii). That, the Commission for Mediation and Arbitration erred in law and facts to decide the matter contrary to the law by failure to consider that the applicant was entitled for the terminal benefits

Before the CMA the arbitrator drew three issues as follows;

1. Iwapo kulikuwa na mahusiano ya kiajira kati ya walalamikaji na mlalamikiwa. (Whether there was employer-employee relationship between the applicants and respondent).
2. Iwapo mlalamikiwa aliwaachisha kazi walalamikaji? (Whether applicants' employment was terminated).

3. Iwapo uachishaji kazi wa walalamikiwa ulikuwa halali? (Whether the termination of employment was lawful).

4. Ni nini nafuu ya kila upande. (what are the reliefs the parties are entitled to)

In the course of answering the above issues the arbitrator found that there was employer-employee relationship, applicant's employment was not terminated by the employer but the applicants had quitted their employment and he ordered the respondent to pay 800,000/= to each applicant being unpaid annual leave payment as they were not paid since 14/01/2018.

The applicant's were aggrieved by decisions hence this application.

The applicants were represented by Mr. Edmund Nditi, Acting Secretary of Tanzania Drivers Workers Association Union (TADWU) and the respondent was represented by Mr. Lwijiso Ndelwa, advocate. The application was disposed of by way of written submissions.

Mr. Edmund Nditi submitted among other things that the applicants were employees of the respondent as Drivers since 14/01/2018 to 12/3/2019 at Tancoal Energy at Ngaka Coal Mining. The respondent had a tendency of delaying payment of salaries. The respondent delayed to pay applicants salary for two months till on 03/05/2019 when the applicants went to claim their salaries from the site administrator who

held a meeting informing them that the company intended to retrench some drivers as the company faced instability due to the fact that many cars needed maintenance and he pointed out that applicants were eye marked to fall on the said redundancy. That they were later informed from the headquarter through cellular phones by Human Resource Manager on the issue of retrenchment, promising them that they would be paid their salaries after three days and they would be given termination letters. Surprisingly the respondent failed to fulfill the promise despite applicant's follow up. He said that, the acts of respondent failing to respond on their issue moved the applicants to refer the matter to the commission for Mediation and Arbitration where the matter was decided against their favor hence this applicant.

Regarding the first point, he said that the arbitrator relied on the evidence of certificate of failure of settlement of which representative for the respondent argued during Mediation session which is contrary to Rule 8(1) and (2) of the Labour Institution (Mediation and Arbitration Guidelines) Rules of 2007, G.N No. 67 which prohibit the use of information in the records of Mediation as Evidence in any matter.

On the issue that the applicants terminated their service was disputed as there is no evidence in the record to prove that there was

absenteeism. He said that if the applicants terminated their service there ought to be a proof of disciplinary action taken by respondent.

On the second point, he argued that the commission misdirected itself on the issue of who terminated the employment between site Administrator and Human Resource Manager. He stated that the site administrator informed the employees that there was a plan to reduce some drivers and pointed out the applicants.

He contended further that; the Arbitrator misdirected herself by stating that the applicants stayed at home waiting for their termination letter while they were living in the office premises of the respondent who was accommodating them. Whereas it was the site Administrator who was living far from the office premises.

In regard to the third issue, Mr. Nditi said that applicants are entitled to terminal benefits as procedures for their termination basing on the operation requirement was violated. He said that the decision of the arbitrator that the applicants are not entitled to terminal benefits is contrary to the law as the evidence on records proves that the applicants were terminated verbally that is why there is no evidence in the record that show the respondent initiated disciplinary action against applicants to prove the denial of their benefits.

The respondent didn't reply to the applicants' written submissions.

The question is whether the arbitrator's award was improperly procured.

Concerning first issue R. 8(1) and (2) of G. N. 67/2007, the Guidelines prohibit arbitrator's use of information disclosed during mediation. I have noted that the arbitrator in deciding whether there was employer/employee relationship, he did refer to F.5 which is parties agreement to extend time for mediation and F. 6 is a form showing outcome of mediation; it showed that mediation had failed. These forms do not disclose information which was disclosed by parties during mediation. Besides, the forms i.e F5 and F6 were produced by the appellants. Furthermore the appellant's were not prejudiced in anyway by reference to the said forms; as indicated above, they did not disclose matters which were discussed during mediation.

I wish to point out that, there is no evidence that the applicant's services were terminated by the employer but on the other hand the applicants terminated their services.

The evidence on record indicates that, the applicants were respondents employees from 14/1/2018 to 12/5/2019. However, there's evidence to the effect that the respondent delayed to pay the applicant's two months' salary. Applicants made follow up on the salaries; on 3/5/2019 they were asked to wait, that they would be paid their salaries

after 3 days. They were also informed that their employer had intended to retrench some employees due to operational reasons. They again, after three days requested for the salaries, they were told to wait for 5 more days. Surprisingly on 12/5/2019 they referred the matter to CMA complaining against termination of employment whilst the dispute was non – payment of salaries. They claimed that the employer has failed to show valid reasons for termination and has also failed to follow a fairness procedure.

As indicated initially, the applicant's claim was late payment of salaries. There is no evidence whatsoever to show that the respondent terminated their services. At the time when they referred the matter to CMA they were still negotiating on payment of two month's unpaid salaries. The salaries were duly paid on 25/5/2019.

As found by the arbitrator, the applicant's evidence regarding termination of their services was contradictory what is stated does not add up. There's evidence showing that there was an intention to retrench some employees. That, the intention was communicated to the applicants through phone call from HQ in Dar es Salaam. Again, there's evidence showing that one administrator told them that some employees would be retrenched and there's evidence that the

Right of Appeal Explained.


S. C. MOSHI

JUDGE

20/10/2020

