**IN THE COURT OF APPEAL OF TANZANIA**

**AT DAR ES SALAAM**

**(CORAM: NDIKA, J.A., KITUSI., J.A. And RUMANYIKA., J.A.)**

**CIVIL APPEAL NO. 354 OF 2019**

**MRISHO OMARY.....1ST APPELLANT**
**JUMA SHOMARI.....2ND APPELLANT**

**VERSUS**

**RAHEEM NATHOO.....RESPONDENT**

**[Appeal from the decision of the High Court of Tanzania (Labour Division) at Dar es Salaam]**

**(Wambura, J.)**

**dated the 27th day of September, 2019**

**in**

**Labour Revision No. 130 of 2019**

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## JUDGMENT OF THE COURT

*9th February & 25th April, 2022*

**KITUSI, J.A.**

This appeal originates from an employment dispute, in which there were two main issues for determination, the first being whether the respondent Raheem Nathoo was indeed the employer of the appellants, Mrisho Omary and Juma Shomari, or not. The appellants alleged that there existed that relationship with the respondent, while on the other hand, the respondent maintained that it did not. There was scarcely any documentary proof of the existence of the employer-employee relationship between the parties, but after referring to section 15 of the Employment and Labour Relations Act No. 6 of 2004 (ELRA) and case

law on the duty of the employer to maintain records of employment, the Commission for Mediation and Arbitration (CMA) concluded that there existed an employer-employee relationship between the appellants and the respondent. On revision that was preferred by the respondent, the High Court Labour Division took a similar view. Before us, it seems, that issue is no longer being pursued. The second issue both at the trial and at the High Court was whether there was termination of that employment.

By way of background, the appellants' case before the CMA was that; in 2014, the respondent offered them a job to work for him as painters of pieces of furniture that were being manufactured at his factory. They accepted the offer and worked for the respondent for salaries of TZS. 2,000,000 per month for the first appellant and TZS. 600,000/= per month for the second appellant. At the hearing before the CMA, the appellants exhibited a number of petty cash vouchers proving payment by their employer

However, all was not merry. Going by the appellants' opening statement at the CMA, it was alleged: -

4. *That on 30th May, 2016 the Respondent orally told the Complainants that he intends to terminate their unspecified*

*employment Agreement so that they inter into fixed term Agreement that the Complainant will work for the Respondent when he has work for them only. The Complainants replied that he has to pay them their entitlements first.*

5. *That the Respondent then told the Complainants to give him ten days to do calculation of their entitlements and after ten days he told the Complaints he has not done the calculations and that the Complainants have to do the calculations for themselves.*

6. *That the Complainants went to TUICO Offices who called the Respondent in phone and the Respondent admitted that he recognizes the Complaints.*

7. *TUICO did the calculation for the Complainants and presented them to the Respondent who replied through his Advocate that he does not recognize the Complaints and that they were employed by two Companies and not the Respondent.*

The respondent's opening statement was to the effect that the appellants were employed by Ms. Splash Sports Equipment Limited and later The Works Ltd. He stated at paragraph 10 that: -

10. *The Respondent understands further that, as THE WORKS LTD was observing the Holy Ramadhan month, few works were made available and the Complainants and other*

*employees were informed of the same. Surprisingly, the Complainants only refused to come back to take their works while alleging that they were not fully paid their arrears and that they were not ready to go back to take their works until they were paid their arrears. Since the Complainants refused to go back to take their works, THE WORKS LTD invited other persons to carry out the work until today.*

The basis of the appellants' complaint was that there was termination of their employment, and that the same was unlawful for violation of procedure.

At the CMA, the respondent's testimony left no doubt that he was familiar with the appellants as persons who worked with Ms. Splash Sports Equipment Limited from April to December in 2015, and then with The Works Limited (The Works) from January to May 2016. He referred to the payment documents as being proof of the fact that the same were made by the two companies.

He testified that normally, during the Holy month of Ramadhani, the companies do not operate in full swing capacity, so workers are told to take leave and report to work only when required to. In May 2016 during Ramadhani, the appellants along with other employees, were told to go on a short leave. However, after seven days the employees were

asked to report back to work because there had come up some work to do. All workers went back to work except the appellants who demanded payment of their dues instead. These were payment of salaries, pension contributions and a month's salary in lieu of notice.

The respondent testified that he told the appellants that he was not the right person to address those grievances to, therefore he advised them to contact the trade union, TUICO. TUICO wrote to him, raising the claims made by the appellants, however, he replied through a lawyer, that the appellants were employees of The Works, not his.

When cross-examined, the respondent stated that the appellants were his fellow employees working for The Works but he had no written contracts proving those pieces of facts. He conceded to be the Managing Director of Ms. Splash Sports. He also conceded that the petty cash vouchers used in paying the appellants do not bear the names of Ms. Splash Sports and/or The Works.

In their testimonies, the appellants stated that they worked for the respondent from October, 2014. On 15/5/2016 he sent them away for seven days on the ground that there was no enough work to do. Later when he called them back, the respondent wanted to enter into a new agreement with them, but they declined, demanding payment of their

previous entitlements first. When the respondent could not make a written disclosure of their dues, the appellants went to TUICO.

The appellants stated that they have never worked for the two companies mentioned by the respondent. One Zuberi Musa, a driver, testified in support of the fact that the respondent was their employer.

After concluding that the respondent was the appellants' employer, the CMA made a finding that the change of terms of the contract of employment without a consensus constituted forced termination in violation of rule 7 (3) of the Employment and Labour Relations (Code of Good Practice) Rules, Government Notice Number 42 of 2007 (the Rules). The CMA held the termination unlawful both on the validity of reason and fairness of procedure and awarded each appellant payment of 12 month's salaries as compensation plus leave and severance pay, the total amounting to Shs. 24,000,000 for the first appellant and Shs. 7,961,538/= for the second appellant.

Dissatisfied, the respondent applied to the High Court, Labour Division, for revision of that decision, citing errors which could be summed up to two areas. **One,** that the CMA erred in holding that only the employer has the duty to maintain employment records without stating that the employee has a similar duty. **Two**, the issue of

constructive termination was extraneous because it was not the subject matter at the CMA.

In dealing with the revision before it, the High Court rightly raised same issues for determination as those that had been raised at the CMA: -

*(i) Whether there is an employer/employee relationship between the applicant and the respondents.*

*(ii) Whether or not the respondents were terminated.*

*(iii) Reliefs entitled to by parties.*

The learned High Court judge concluded that the appellants were employees of the respondent because some of the factors stipulated under section 61 (a) - (g) of the Labour Institutions Act No. 7 of 2004 (LIA) which prescribe existence of that relationship, did exist.

As alluded to earlier, the conclusion that the respondent was the appellants' employer is no longer being questioned because the respondent did not appeal that decision. However, the learned judge answered the second issue in the negative, holding: -

> *"Having perused the record, I have found that there is no proof that the respondents were constructively terminated. The change of terms*

*of contract was addressed orally and the applicant had even not disclosed the said terms yet. They were even not addressed before the CMA to prove the unfavourability of the new contract terms. As it is, there is even no proof of termination. I thus find that the respondents cannot be said to have been constructively terminated".*

The third issue concerning reliefs was interred along with the finding in the second issue, obviously because there could not be any relief to the appellants whose employment, according to the learned judge, had not been terminated.

The appellants are up in arms faulting the High Court judge. They have raised two grounds of appeal which Mr. Bernard Shirima, learned advocate representing the said appellants, argued jointly. The two grounds run thus: -

"*1. That the learned Judge erred in law and in fact by holding that there was no constructive termination of employment done by the Respondent.*

*2. That the learned Judge erred in law and in fact by holding that the Appellants were lawfully*

*terminated from their employment with the Respondent".*

The respondent enjoyed services of Mr. Methodius Melkior Tarimo, learned advocate.

Before we refer to the submissions made by counsel, we have two observations to make so as to keep matters in proper perspectives. **One**, section 57 of the Labour Institutions Act, Cap 300 provides that appeals to this Court from the Labour Court, lie only on points of law. Given that statutory limitation, in considering the two grounds of appeal alleging errors *"in law and in fact"* we will confine ourselves only to arguments raising points of law. **Two,** we do not see anywhere in the judgment of the High Court, especially from the paragraph reproduced a while ago, suggesting that the learned judge concluded that the appellants were lawfully terminated. All the learned judge said was that there was no proof of constructive termination because the proposed new terms of contract had not even been disclosed, hence there was no justification for the appellants getting suspicious. We will therefore treat the second ground of appeal as being misconceived.

Having so observed, we think there is only one ground of appeal for our determination in this appeal, and it raises one point of law;

whether there was constructive termination of the appellants' employment.

Mr. Shirima was brief in faulting the learned judge's conclusion that there was no constructive termination. He submitted that the respondent violated section 15 of the ELRA and section 60 of LIA which require the employer to maintain employment records. The learned counsel further submitted that the acts of the respondent forcing the appellants to sign a new contract with new undisclosed terms amounted to constructive termination of employment. The appellants did not tender their resignation, he submitted, but they opted to be paid their terminal benefits.

Submitting in opposition, Mr. Tarimo referred to section 36 of the ELRA and pointed out that there was no constructive termination within the meaning of sub section (a) (ii) of section 36 of that Act. He went on to submit that there was no evidence that the appellants resigned nor did they refer to acts or conduct by the respondent that may be said to have amounted to constructive termination. He further argued that the law requires the said acts by the employer to be continuous for a certain period of time.

On whether the issue of constructive termination was raised by the CMA *suo mottu* or not, both counsel submitted that the issue raised in the complaint, whether or not there was termination, sufficiently made the parties aware of what was ahead of them without necessarily referring to it specifically as constructive termination. In that sense, the learned counsel were agreed that the finding by the learned judge that the issue of constructive termination was not raised before the CMA, was faulty. We agree with the view taken by the learned counsel.

After hearing the arguments and considering the relevant law, we are satisfied that the appeal turns on whether the respondent made the appellants' continued employment intolerable as to constitute constructive termination in terms of section 36 (a) (ii) of the ELRA.

From statutory and case law, there are agreed factors that must be looked at by the court or tribunal in concluding whether or not constructive termination has been established. These are reflected in Rule 7 of the Rules, which was cited by the CMA in its award, which are:-

(i) Employer should have made employment intolerable.

(ii) Termination should have been prompted or caused by the conduct of the employer.

(iv) The employee must establish that there was no voluntary intention by the employee to resign. The employer must have caused the resignation.

(v) The arbitrator or the court must look at the employer's conduct as a whole and determine whether its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it.

Fortunately, the issue of constructive termination is not novel in our courts. The High Court, Labour Division has dealt with it in, **Access Bank Tanzania Limited v. Scholastica Julius,** Labour Revision No. 101 of 2018; **Abdallah Mbukuzi v. TPB Bank Pic,** Revision No, 662 of 2019; **Anastazia Lukomo v. SOS Children's Village Tanzania,** Revision No. 8 of 2019; **Girango Security Group v. Rajabu Masudi Nzige**, Revision No. 164 of 2013 and; **Katavi Resort v. Munirah J. Rashid,** Revision No. 174 of 2013 (all unreported).

The last two cases were cited with approval by this Court in **Kobil Tanzania Limited v. Fabrice Ezaovi**, Civil Appeal No. 134 of 2017

(unreported) reproducing a paragraph from **Katavi Resort** (supra), that: -

> *".... ask themselves the following questions as put down by the LAC – Labour Appeal Court of the Republic of South Afrika (LAC) where our new labour laws are heavily borrowed from.... First, did the employee intend to bring the employment relationship to an end? –* ***Jooste v. Transnet Ltd t/a South African Airways*** *[1995] 16 ILJ 629 (LAC). Second, had the working relationship become so unbearable, objectively speaking, that the employee could not fulfil his obligation to work? –* ***Pretoria Society for the Care of the Retarded v. Loots*** *[1997] 18 ILJ 981 (LAC). Third, did the employer create an intolerable situation likely to continue for a period that justified termination of the relationship by the employee? –* ***Pretoria Society for the Care of the Retarded v. Loots*** *[1997] 18 ILJ 981 (LAC). Fifth, was the termination of the employment contract the only reasonable option open to the employee?"*
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> [See also **Girango Security Group v. Rajabu Masudi Nzige**, Labour Revision No.164/2013 (unreported).]

We shall test the alleged acts of the respondent against those factors in order to determine whether the learned judge's conclusion of the matter was correct or not. We shall keep in mind the fact that in applying the principles, regard should be had to the peculiar circumstances of each case. We are also aware that in constructive termination, the burden of proof rests on the employee.

In **Kobil Tanzania Limited** (supra) the Court reproduced the following passage from an article titled **Constructive Dismissal – A Last Resort Remedy: -**

> *"Unlike all other dismissals, where an employee claims that they have been constructively dismissed the onus/burden of proof is placed upon them to prove that their resignation was justified. In effect, they are required to prove that they have exhausted all other avenues of resolution before they have resigned from their position. This would generally require them to bring their grievance to the attention of their employer, follow all the employer's grievance procedures and industrial relations procedures, as outlined in their contract or the employee handbook. Only where these procedures have not achieved an appropriate outcome or where*

*the employer has refused to comply with or engage in these procedures, then should an employee consider resigning from their position. A failure to invoke these procedures may leave the Court or Tribunal open to rejecting a claim of constructive dismissal."*

From the quoted passage, the burden is on an employee to prove constructive termination. In our view, there are two instances for our consideration, from which a conclusion may be drawn whether the appellants discharged their duty in establishing constructive termination. The first act that triggered off the complaint, was the alleged demand by the respondent to sign a new contract with the appellants before paying them their outstanding entitlements. The second instance is the fact that the respondent told the appellants that he was not their employer.

In our considered view, by the respondent requiring the appellants to sign the new contract or else lose their outstanding entitlements, he was offering them a Hobson's Choice and putting them at a ransom. The fact that the new terms of the contract had not been disclosed, a fact also appreciated by the learned judge, aggravated matters, in our view. We do not share with the learned judge, the view that the non-

disclosure of the terms of the new contract was not a problem to the appellants because, to the contrary, that is where the problem actually rested. This conduct left the employees with no choice and it was, in our conclusion, sufficient to make the working conditions unbearable. We fault the learned judge for taking a different view.

The second conduct was, certainly worse, because no conduct of an employer would be more frustrating to the employees than the act of disowning them. There is no dispute that the respondent's denial of his position as the appellants' employer was overt. Looked at from the employees' angle, what was there for them to cling to after that denial? Mr. Tarimo could be right in arguing that for a conduct to constitute constructive termination, it must persist for a certain period of time. With respect however, we do not think that applies to the situation we are faced with, where the employer disowns the employees. In the present situation, there is no grievance procedure which the appellants could be required to have exhausted, because such procedure presupposes presence of an employer. In the peculiar circumstances of this case, we find constructive termination to have been proved.

For the reasons discussed above, we find merit in the sole ground of appeal and allow it. We quash the judgment of the High Court and

set aside the decree and proceed to restore that of the CMA. We order no costs.

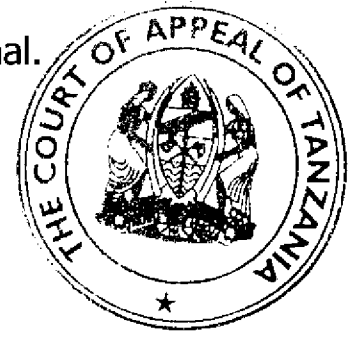
**DATED** at **DAR ES SALAAM** this 20th day of April, 2022.

G. A. M. NDIKA
**JUSTICE OF APPEAL**

I. P. KITUSI
**JUSTICE OF APPEAL**

S. M. RUMANYIKA
**JUSTICE OF APPEAL**

The Judgment delivered this 25th day of April, 2022 in the presence of 1st and 2nd appellants in person and Mr. Methodius Tarimo, learned counsel for the Respondent, is hereby certified as a true copy of original.




G. H. HERBERT
**DEPUTY REGISTRAR**
**COURT OF APPEAL**