

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

THE SUB - REGISTRY OF MWANZA

AT MWANZA

LABOUR REVISION NO. 2 OF 2023

[From Labour Dispute No CMA/MZ/NYAM/330/2021/05/2022]

VIJIM LTD-----1ST APPLICANT

HOTEL KINGDOM-----2ND APPLICANT

VERSUS

ROCHE MARWA MARIBA-----RESPONDENT

JUDGEMENT

Sept. 29th & Oct. 6th 2023

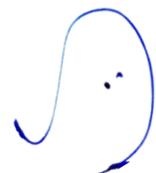
Morris, J

The court is being moved by the applicants above to revise the award of the of Mwanza Commission for Mediation and Arbitration (elsewhere, *CMA or Commission*) in labour dispute no. CMA/MZ/NYAM/330/2021/05/2022. The Commission's Award is being faulted on four premises. Nonetheless, in the interest of brevity and coherence, such grounds were merges into two issues. **One**, whether the CMA was correct to order re-engagement after founding that the respondent's employment was never terminated. **Two**,

whether it was proper for CMA not to find and rule that the respondent had absconded from his employment.

Briefly accounted, the facts of this matter are as follows: the respondent referred the dispute before the CMA claiming that he was unfairly terminated from his employment. On their part, the applicants claimed (vide the opening statement) that the respondent had absconded from work following exhaustion of his annual leave which ran from 6/12/2021 to 5/1/2022. Nonetheless, the CMA Award is to the effect that there was no proof of termination of employment. This finding notwithstanding, it ordered the respondent to be re-engaged. At page 14, the Award reads;

*"...kwa kuwa pande zote mbili wameshindwa kuthibitisha uachishwaji kazi huo mbele ya Tume wakati wa ushahidi wao, na kwa kuwa ushahidi wa pande zote mbili umejikita kwenye kusikia na kuambiwa pasipokuwa na uthibitisho wowote, ili Tume kutenda haki kwa pande zote mbili, **inamrudisha kazini mlalamikaji (re-engage) kwenye kazi yake ile ile kwa masharti yale yale bila kupewa ujira wa aina yoyote tangu **siku ya alipoachishwa kazi mpaka uamuzi huu unavyotolewa,...**"***
(emphasis added).



The foregoing decision aggrieved the applicants. Hence, the present application manifests such disgruntlement. I ordered the application be argued by way of written submissions. The filing-schedule was complied with by parties as ordered. The applicants and respondents enjoyed services of Ms. Rosemary G. Makori and Mr. Madulu B. Madulu, both learned Advocates. The submissions of parties are easily graspable. Ms. Makori submitted that the respondent never reported back to work after completion of his annual leave. Instead, he lodged the labour complaint at CMA on 13/1/2023 on pretext that he was unfairly terminated by the applicants.

She argued further that according to Rule 9(1) of ***the Employment and Labour Relations (Code of Good Practice) Rules, 2007***; abscondment from work for more than 5 days without notice to the employer amounts to automatic/self-termination. Further reference was made to the cases of ***Iman Morris Mnziranzinza v I can go on Plus Company***, Labour Revision No. 364 of 2019; and ***Emanuel Daud Mmari v Zaituni Abduly Ismailu***, Labour Revision No. 69 of 2018 (both unreported).

The applicants submitted further that, after finding that there was no termination of employment by the employer, as alleged by the respondent; it was irregular and illegitimate for the Commission to order re-engagement. To her, section 40 (1) (b) of ***the Employment and labour Relations Act***, Cap 366 R.E 2019 (***the Act***) was not properly applied by the hon. Arbitrator. She also argued that, in law, rivalry parties cannot tie. That is, there must be a winner depending on the weight of such party's evidence. In other words, in the adversarial system the heavier the evidence of a party, the more the likelihood of such party's victory.

Therefore, according to Ms. Makori, for the reason that it was unproved that the respondent was not terminated; and on the basis of the factual pattern that he had absconded from work, the CMA's orders in the Award were unjustified. Further, Rosemary invited the Court to vary the order for re-engagement; and in alternative, to find that the respondent absconded which Commission lead to own termination.

In reply, it was submitted for the respondent that the applicants failed to substantiate that the former was on annual leave and failed to return to work thereafter. To the respondent, the remedy for re-engagement was



correctly arrived at under section 40 (1) (b) of ***the Act***. It was argued further that the Award is fair because neither the applicants nor the respondent proved their respective cases. Therefore, to him the decision of CMA should not be faulted. In alternative, he beseeched this court to order the applicants to compensate him with 12 months' salary in lieu of re-engagement.

In the course of composing this judgement, I noted a very critical material irregularity in the CMA's proceedings and Award. That is, the Commission made a conclusive finding on the contentious allegations about abscondment without first framing the corresponding issue for CMA's determination. As explicated above, applicant's defence gist throughout the trial was that the respondent failed to resume work after his annual leave. To them, his absence from the work place effective 5/1/2022 led to the employee-respondent's automatic termination and/or resignation from work. Nonetheless, the respondent refuted such applicants' asseverations and matching evidence. All over the CMA proceedings and record, however, this vital contention was not set as an issue for determination.



Pursuant to the observation above, I accordingly invited parties to address the Court on the propriety of the CMA's determination of abscondment contention without formulating the corresponding issue thereof. The respective advocates attended. Ms. Makori submitted that the CMA was not correct to determine the matter without tasking parties to produce proof. Mr. Madulu, on his part, was of the view that the CMA was correct to hold so due to evidence produced and issues framed. I will commence with determination of this court-raised (additional) issue before embarking on the other grounds, where necessary.

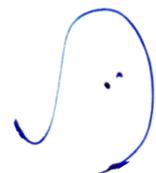
In my view, therefore, the Commission's issue as to whether or not the respondent absconded from work was important to be formulated. Thereafter, parties would have mobilized and marshalled requisite evidence for and against such stance for the CMA's ultimate determination. Consequently, for the Commission to delve into deciding on fairness or otherwise of the putting to an end the relationship between the parties herein; preceding determination of consequences of each side's involvement prior to and/or during the dispute herein, was apposite. I, *albeit* in brief, undertake to justify my holding hereof below.



First, in any litigation, an issue for determination arises upon a material proposition of fact or law or both being raised by one party and when it is denied by the counterpart [***Ally Rashid and 534 Others v Permanent Secretary, Ministry of Industry and Trade and AG***, CoA Civil Appeal No. 71 of 2018 (unreported); and Order XIV of ***the Civil Procedure Code***, Cap. 33 R.E. 2019]. **Second**, issues are extractable from parties' pleadings as a whole. That is, as parties are held to be bound by own pleadings, the *prima-facie* assumption is that, whatever they present in their respective pleadings, is correct.

Third, it is an unimpeachable obligation of the court or quasi-judicial body to resolve all issues arising out of pleadings. In law, "failure to do so constitutes abdication of duty to procedurally adjudicate disputes presented to court" [***Kukal Properties Development Ltd v Maloo and Others*** (1990-1994) EA 281; ***Alnoor Shariff Jamal v Bahadur Ebrahim Shamji***, Civil Appeal No. 25 of 2006 (unreported); and ***Ally Rashid and 534 Others (supra)***].

Fourth, for the parties' dispute to be fully determined, the law provides adequate flexibility for courts to amend and reformulate issues at



opportune times, provided parties are heard thereof [**Mohamed Masoud Abdallah and 42 Others v Tanzania Road Haulage (1980) Ltd**, CoA Consolidated Civil Appeal Nos. 150 & 158 of 2019 (unreported)]. **Fifth**, a different set of material proposition which one party raises and another denies, forms “the subject of a distinct issue”.

The foregoing position is the import of, for example, Order XIV Rule 3 of **the Civil Procedure Code** (*supra*); rules 10(2) and 20 (4) (a) & (5) of **the Labour Court Rules**, 2007 GN 106/2007; rule 24 (1) and (4) of **the Labour Institutions (Mediation and Arbitration Guidelines) Rules**, 2007; GN 67/2007. The latter subrule provides as follows:

“At the conclusion of the opening statements, the Arbitrator shall attempt to narrow down the issues in dispute as much as possible and explain to the parties that the purpose of doing so is to eliminate the need for evidence in respect of factual disputes.”

Sixth, the adjudicator is enjoined by law to decide on each and every framed issue; lest the impugned decision is accordingly vitiable [**Alnoor Shariff Jamal v. Bahadur Ebrahim Shamji** (*supra*)].

For the given reason and analysis above, this issue disposes the application without delving into the other grounds. I allow the application accordingly. For avoidance of any doubt, I quash the CMA's proceedings from the stage of framing of issues onwards; and hereby set aside the Award and/or orders therefrom.

In consequence, therefore, the record is remitted back to the Commission for the parties to be heard by a different Arbitrator on issues to be framed afresh. Each party shall shoulder own costs. It is so ordered. Right of Appeal is also fully explained to the parties.



C.K.K. Morris

Judge

October 6th, 2023

Judgment delivered this 6th day of October 2023 in the presence of the Ms. Rosemary Makori and Mr. Madulu Madulu; learned Counsel for the applicants and respondent respectively. The respondent is also in attendance.



C.K.K. Morris

Judge

October 6th, 2023

