IN THE HIGH COURT OF TANZANIA
LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 890 OF 2018

SAID SELEMAN AND 13 OTHERS.....APPLICANTS

VERSUS

A-ONE PRODUCT AND BUTTLERS LTD.....RESPONDENT

JUDGMENT

Date of Last Order: 19/06/2020
Date of Judgment: 15/07/2020

Z.G.Muruke,J

Said Seleman and 13 others were the applicants in labour dispute with reference number CMA/DSM/ILA/R.539/15 at Commission for Mediation and Arbitration Ilala Office. They were employed on various dates on permanent terms and given identity cards as employee of respondent. CMA upon hearing both parties, dismissed applicant claims. Being dissatisfied, they filed present revision raising following grounds.

(i) That the honourable arbitrator erred in law and facts for failure to interpret the evidence on record tendered by the applicant.

(ii) That the Honourable arbitrator erred in law and facts to hold that the applicants are not entitled to terminate benefits claim

(iii) That the Honourable arbitrator erred in law and facts to hold that there was no unfair termination to the applicant.

Hearing was conducted by way of written submission. Applicant was being represented by Pascal Temba, Personal representative of their own choice, while respondent had the service of Mwambene Adam, advocate from Associated Attorneys.

In support of ground one applicant representative submitted that arbitrator failed to consider the fact that, the action of a company management not to take any action towards the claim will render the work to be intolerable for the applicants, because same person will continue to work with them and who can also make same mistake. Arbitrator also failed to appreciate that same document which was to be tendered by applicants were tendered by respondents because is the one who is the custodian of the documents. So arbitrator was aware of what the applicants were claiming.

In order for termination to be fair the employer must follow the requirements made under Section 37(2) of the Employment and Labour Relation Act and Rule 13(5) of GN 42 of 2007 which form the basis for fair disciplinary hearing under Section 37(2) of Employment and Labour Relations Act, which put clear that, termination is unfair if employer fails to prove that reasons are valid, there is fair reason and procedure was fair.

Applicant representative cited Court of Appeal case of **Elia Kasalile and others Vs. Institute of Social Work,** Civil Appeal No. 145/2016, and Article 7 of ILO commission No. 158 of 1984 that provide for procedure to be followed before termination.

It was further submitted that at page 17 paragraph 4 of the award the arbitration said that applicants were told to write letter of apologies for

them to continue working. Those who will not write an apology letter, will be regarded as terminated from their work. It is not proper procedure conducted by respondent on termination. Arbitrator should not have regarded as employee voluntary termination of their employment contract.

Section 40(1) of employment and Labour Relation act, provides for employer to pay compensation if unfair terminated his employee. Despite evidence on records arbitrator failed to order compensation to the applicants. Evidence also prove that applicants were terminated by respondent simply because they fail to write the apologies letter and ask the management to continue with the work without solving the main cause of the complaint which was mistreatment of the shift in charged.

At the end applicants prayed to revise, set aside the whole proceedings and decision reached by Chuwa P.M. on 12th July, 2017.

Respondent counsel submitted in replay that 1st ground for revision, is not only grossly misconceived but also unfounded. We wish to refer to the records of the Commission for Mediation and Arbitration, where following exhibits tendered by the applicants.

i. *Exhibit A-1 Nakala ya mkataba wa Said Nassoro Suleiman, at page 7 of CMA award.*

The respondent's had tendered the following Exhibits before CMA as follows:

i. **Exhibit D-1 Mahudhurio ya kikao cha tarehe 27/04/2003.**
ii. **Exhibit D-5 tangazo la kutakiwa kuomba radhi, page 12 of award.**
iii. **Exhibit D-6 mahudhurio ya kikao cha tarehe 03/05/2003, page 12.**

iv. Exhibit D-7 barua za jumla za kuomba suluhu, page 12 of the award.

Looking at these exhibits, applicants have not cited any single exhibit, which the arbitrator had failed to interpret as alleged. But much more, these identified exhibits, they are all self – explanatory, to establish that this matter was pre mature before the CMA, as there were internal proceedings initiated by the applicants themselves, following their complaints against their shift in- charge to the management. Before these internal proceedings were completed, applicants on their own accord left and sought intervention to the commission. Therefore the complaint before the commission was pre-mature, as the management had not concluded determination of the complaint against the shift in charge, at the work place same issue was discussed in the case of **Meena Ludovick & Others Vs. Tridea Cosmetics (T) Ltd**, High Court Dar es Salaam Registry, Revision No. 125 of 2013. Reported as case No. 177 LCCD 2013, at page 314, Hon. Wambura, J held that.

> ***"Disputes have to be resolved at CMA as per section 86 of ELRA after disciplinary hearings have been concluded at work place, thereafter revision lie at the High Court. Since the matter was filed at CMA premature, because the applicants had not been terminated, this court lacks jurisdiction to entertain the matter. I accordingly dismiss the matter...."***

In the instant case, applicants after informally submitted their complaint against their shift in charge, on meeting with the respondent's management on the 1st meeting (Exhibit D1). Applicants were advised to present a formal complaint to the management. In so doing, applicants

submitted unofficial letter which had no names, no signatures as such in the second meeting (Exhibit D6) it was rejected. Applicants were not satisfied, as they wanted the complaint to be handled on their own way, eventually they left and sought intervention to the Commission before the matter was concluded at place of work. In the light of the above, the dispute was only pre mature, hence this court has no jurisdiction to entertain it, it ought to be dismissed.

This court having gone through CMA records, this court records, and final submission by both parties the central issue for determination is weather:

i. *Whether the respondent did terminate the complainant's employment contracts.*

To be able to answer the issue above brief back ground of the dispute is mandatory. In the beginning of May, 2013 the complainants were working in one shift B among the two shifts, resorted to illegal silent strike in that whenever their shift was up they entered the plant and stopped operations of the machines for three days continuously. On 27th April, 2013 the respondent asked the complainants to explain in writing as to why they were stopping the operation of the machines without any reasons and mentioning names of all grieved workers of which the complainants replied their allegation in writing through their letter dated 29th April, 2013 but their letter of complaint was not signed and had no names of the complainants therein.

The responded advised the complainant on their letter dated on 27th April, 2013 the letter ought to be unofficial one bearing the names and signature of the author or the affected for the purpose of availing the

management an opportunity to know the complaints and details find out peacefully way for redress. However to the surprise and disappointment of the respondent they declined to ratify their letter and continued with their illegal silent strike. Respondent sought the intervention of Police Force who came and tried their best to talk to the complaints with no success.

On 3rd May, 2013 the respondent issued a notice to all the employees of the said Shift B requiring each of them to write a letter to the management for participating in the illegal strike, the complaints were given reasonable time to comply with the requirement but to the astonishment of the respondent only fifteen (15) of the complied and they continued working up to date the rest refused to comply.

The complainants were not terminated from their employment contract as they purposed to allege but rather they disqualified themselves to form working with the respondents by illegally participating in silent strike. Since the complainants were disqualified themselves from working, their allegations of unfair termination and claims thereof are baseless.

According to the records the respondent tried its best to ensure that complainants continued working. In his own words PW1 testified that;

> "...Ndipo Meneja rasilimali watu aliongea kwamba hatuwezi kuamua lolote hapa hadi watu wote watoke ndani ya kiwanda waende nje, ndipo askari alipoamrisha watu wote watoke ndani waende nje, Askari akasema teueni watu sita (6) kwenda kujadiliana na uongozi, baada ya kuteua hao watu sita (6), kwenda kujadiliana na uongozi...."

From these records, it may be important to note and underline that if there was any termination of employment from the respondent, there

would be no need for further consultation as the records suggests that the Police Officer instructed the employees to elect six (6) employees among them for consultation meetings.

The complainants' complaints against Mr. Binesh had nothing to do with the reasons for termination of employment contracts. This was a just normal complaint which ought to have addressed in the normal way, without affecting employees employment contracts. When he was asked what were the employee's complaints against Binesh? (PW1) had this to say;

> **"Bishen alikuwa ni shift Incharge alikuwa na tabia ya kushika watu makalio, matusi ya nguoni, kwa lugha ya kihindi, kiingereza na Kiswahili. Tanzania people are like a pig....."**

In further cross examination (PW1) admitted that there was no evidence to prove that respondent did terminate the complaint's employment contracts;

> **"Ushahidi nilionao mpaka sasa tupo nje, hatupo kazini, na hatukupewa chochote, na hatukupewa barua. Je kuwa nje ni ushahidi kuwa mkataba umesitishwa? Ndio mheshimiwa kwa sababu haturuhusiwi kuingia tena."**

From these records, there is no doubt that there were no evidence given to establish that respondent did terminate he employee's employment contracts, amid the employee's complaints against Mr. Binesh. To this effect PW1 also admitted that on 27th April, 2013, there was a consultation meeting related to employee's complaints against Binesh, when he said. The agenda of the meeting was about the complaints against Binesh, there was no any meeting related to

termination of employment contracts for any reasons, according to the records.

In his own words PW1 noted that:"

> *Tarehe 27/04/2013 tulikaa na uongozi kuhusu malalamiko ya Mr.Binesh kwa vitendo vya unyanyasaji, kikao kilichokaa ni kuhusu Mr. Binesh hatukuwahi kukaa kikao kuhusu kusitisha ajira zatu." He insisted.*

Accordingly to the records, is clear why there was no consultation meeting related to termination of employment, simply because there was no intention to terminate employee's employment contracts. Thus the complainants' evidence has by far failed to establish its case especially relating to allegations that the respondent did terminate their employment contracts.

Further evidence that proves applicants were not terminated are as testified by PW1 on 2nd day of February 2016, (PW1) one appeared before the Commission and gave his key testimony as follows:

i. That they were employed on various dates on permanent terms contracts, they were given identity cards as employees of the respondent and he tendered exhibits A1 being their original Identity cards. With respect, this fact established without reasonable doubt that complainants were never terminated, that is why up to the time they are before the Commission, they were still in possession of their identity cards.

In the normal circumstances, once the employment relationship comes to an end, the employer must claim back the identity card issued to the employees, least they may not misuse. In the present case the

respondent never asked for the return of the identity cards, as the complainants were still its employees.

The respondent brought three witnesses in support of its case. **Ikbal Premji Manji, (DW1), Thomas Steven Osaso (DW2) and Ally Hamisi Mirrow (DW3)** who are the company inside lawyer, the director of the insight security and the Human Resource respectively.

According to the records DW1 and DW3 recognized the complainants as employees of the respondent working in the shift 'B' of the beverage department who were all involved in an incident that led to denying their shift in charge one Mr. Binesh. Both DW1 and DW3 explained the commission the series of consultations meetings with effect from 27th April, 2013, between the employee's representatives and the management with the main agenda being addressing the employee's complaints against Mr. Binesh, and at the same getting the employees continued working.

Both DW1 and DW3 keenly supported their dispositions with exhibits tendered before the commission, and the same received in chronological order as follows;

i. D1 being the attendance and minutes of the consultation meeting dated 27th April, 2013.
ii. D2 being letter by employees dated 29th April 2013, and a list of names of the employees.
iii. D3 being attendance list of shift be employees.
iv. D4 being attendance list to the consultation meeting dated 2nd May, 2013.
v. D5 being attendance list to the consultation meeting dated 3rd May 2013

vi. D6 Official announcement dated 3rd May, 2013

vii. D7 being a letter requesting for forgiveness by employees dated 4th May, 2013.

Closely looking at these documentary evidences chronologically, it may be safely and certainly deducted that both DW1 and DW3 agrees in their evidence the following key issues;

i. That the process initiated by employees on the 27th April 2013, by presentation of the complaints against Mr. Binesh, seeking that the management could address it, was never completed before the employees themselves disappeared from the 4th May, 2013.

ii. That during the entire period from 27th April. 2013 until 4th May, 2013 when there were a series of consultation meeting between complainants and the management, no production work was performed by the employees.

iii. That since the settling of the complainants against Mr. Binesh was yet completed, no decision on the parting between the parties could be made.

All the three witnesses (DW1, DW2 and DW3) gave the same explanations as to what happened on the 2nd day of May,2013. On which the complainants reported on duty as usual in the morning, started the production machines, but only at 8.30 am upon seeing Mr. Binesh coming in, they stopped the machines. The efforts by the management to intervene the stoppage proved failure. Head office team was called upon tried to intervene as well but also the employees refused. Then Head Office team called upon the director of the insight security company which provide security at the respondent's premises, and the Police from Buguruni Police Station. All the three witnesses confirmed that it was with

the help of the Police Officers that the employees agreed to got out of the factory and also agreed to elect six (6) of their representation at the consultation meeting with the management and in the presence of the Police and the insight security.

Efforts failed to bring the parties to any solution, as the employees insisted their position that they did not want Mr. Binesh at all costs. Respondent to the question what did the 2nd May, 2013 meeting achieved DW1 responded;

> "Kikao cha tarehe 2/05/2013 baada ya kuzungumza wawakilishi na Mwenyekiti Afisa wa Polisi, ambae aliwashauri wawakilishi waende wakawambie wenzao warejee kazini kwa kuwa Bwana Binesh alikuwa hayupo na malalamiko yao yanaendelea kushughulikiwa, wafanyakazi hao walikaidi, nakusema kwamba wao msimamo wao ni uleule kwamba Bineshi aondolewe kazini na sio tu kwenye Idara yao, baadae mwenyekiti aliamuru waondoke."

Obviously what followed on the 3rd and 4th May, 2013 was only a continuation of the process started on 27th April, 2013 however, before the same process was conclusively determined, complainants disappeared, never came back until the 8th May, 2013, with their referral of the complaint to the Commission for mediation and Arbitration.

On the strength of the above clear evidential records, respondent did not terminate the applicants employment contracts. The allegation that respondent did terminate the contracts has no basis.

Section 60(2) of the Labour Institutions Act, No. 7 of 2004, provides as follows;

(a) The person who alleges that a right or protection conferred by any labour law, has been contravened shall prove the facts of the conduct to constitute the contravention unless the provisions of subsection (1)(b) apply.

(b) The party, who is alleged to have engaged in the conduct in question, shall then prove that the conduct does not constitute a contravention.

It is the complainants who have alleged for unfair termination, before this Commission, and in terms of subsection (a) herein above cited, it is the complainants who have the burden of proof of their allegations, but both in their examination in chief and cross examination of the complainant's key witness, they have completely failed by far to establish the allegations for unfair termination as their initiated procedure for addressing their complaints against Mr.Binesh was never completed when they disappeared to invoke the intervention of the Commission for Mediation and Arbitration.

The above settled principle of law that "he who allege must prove the allegations" is embodied in Section 110 and 112 of the Tanzania Evidence Act, [Cap. 6. R.E. 2002]. This reads as follows;

"S.110 (1) whoever desires any court to give judgement as to any legal right on liability dependent on the existence of facts which he asserts must proof that those facts exists.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

S. 111 the burden of proof in a suit proceeding lies on that person who would fail if no evidence at all were given on either side"

The need for any person to prove what he alleges was emphasized in the case of **Lamshore Limited and J.S. Kinyanjui versus Bizanje**

K.V.D.K [1999] TLR 330 where the High Court of Zanzibar, while discussing Section 102 and 103 of the Zanzibar Evidence Decree which are similar to the provisions in the Evidence Act, Cap, 6 (R.E. 2002) cited herein above, had this to say in paragraph F and I;

> *"There was also the question of the Plaintiff Company not being registered in England. It is the defendants alleging this; they therefore had the duty to prove non registration of the Company in England. He who alleges a fact has the duty to prove it. [Sections 102 and 103 of the Evidence Decree chapter 5.) The defendants came up with no evidence to discharge this duty. This argument then be it on its own merits or in supplement to any other would stand to collapse, it be accordingly overruled" Emphasis provided".*

In the light of the above reasoning, there were no valid reasons for the Respondent to initiate termination of the complainant's employment contracts while Respondent was fighting that the complainants keep working while it was addressing their complaints' against Mr. Binesh. Complainants have failed to establish their allegations for being terminated by the Respondent. Since respondent did not terminate applicants, then the second issue fails automatic. From the evidence on records, applicants were not terminated only that, their choice is their own destiny. They filed dispute at CMA pre-mutually. In short, application for revision dismissed for want of merits.

Z.G.Muruke

JUDGE

15/07/2020

Judgment delivered in the presence of Pascal Temba, Personal Representative for applicant and in the absence of the respondent.

Z.G.Muruke

JUDGE

15/07/2020