IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

LABOUR REVISION NO. 421 OF 2019

BETWEEN

THE COPY CAT (T) LTD.....APPLICANT

VERSUS

MARIAM CHAMBA.....RESPONDENT

JUDGEMENT

Date of Last Order: 24/06/2020

Date of Judgement: 04/09/2020

Aboud, J.

The applicant, The Copy Cat (T) Ltd filed the present application seeking for revision of the award of the Commission for Mediation and Arbitration (herein after referred as CMA) issued by Hon. E. Tibenda, Arbitrator in Labour dispute No. CMA/DSM/KIN/R.529/15 delivered on 20/07/2016. The application was made on the following grounds:-

i. That the Honourable Arbitrator erred both in law and in facts and grossly misdirected herself by treating willful resignation as a constructive termination.

ii. That the Honourable Arbitrator erred in law and in facts by misdirecting herself thereby awarding Tshs. 100,000,000= to the respondent as general damages on the basis of solace contrary to the law.

iii. That the Honourable Arbitrator erred in law and in fact by delivering an award in favour of the respondent contrary to the evidence on record.

The brief facts of the dispute are that; the respondent was an employee of the applicant from 01/06/1966. In her employment she raised through the ranks from a junior clerical position to the position of Head of Human Resource and Administration the position she held upon her resignation. On 07/08/2015 the respondent tendered resignation letter to the employer, respondent. She thereafter claimed for constructive termination and, subsequently on 25/11/2015 instituted her complaint at the CMA praying for reinstatement and general damages amounting to Tshs. 100,000,000/=.

The CMA decided in favour of the respondent herein, where it was found that the applicant's conduct made employment intolerable to the respondent to continue working. As a result the CMA awarded

the respondent general damages to the tune of Tshs. 100,000,000/= as a solace. Being resentful by the Arbitrator's award the applicant filed the present application.

During hearing both parties were represented by Learned Counsels. Mr. Rahim Mbwambo was for the applicant while Mr. George Magambo appeared for the respondent. The matter was argued by way of written submission.

Arguing the application Mr. Rahim Mbwambo submitted that, in determining a case of constructive termination this Court has established principles which would guide Judges and Arbitrators to reach a rational decision. He stated that the principles are well discussed in the case of **Girango Security Group Vs. Rajabu Masudi Nzige,** Rev. No. 164 of 2013, Lab. Div. DSM (unreported) where the following imperative questions have to be answered to prove constructive termination:-

i. Did the employee intend to bring the employment relationship to an end?

ii. Had the working relationship become so unbearable, objectively speaking, that the employee could not fulfill his obligation to work?

iii. Did the employer create intolerable situation?

iv. Was the intolerable situation likely to continue for period that justified termination of the relationship by the employee?

v. Was the termination of the employment contract the only reasonable option open to the employee?

In addressing the first question Mr. Rahim Mbwambo submitted that, the respondent initiated the process of termination by submitting a three month notice of resignation to her employer, the applicant (Exhibit CH1). He further stated that, in the relevant letter the respondent stated the reason for her decision was career growth and moving onto new opportunities and challenges. He said the content of the respondent's notice of resignation does not suggest or indicate any sign of forceful resignation. Mr. Rahim Mbwambo cited a number of cases to robust his submission.

As to the second question Mr. Rahim Mbwambo defined the term unbearable to mean too painful, annoying or unpleasant to deal with or accept. He stated that, it is for the resigning employee to prove the presence of these extremely harsh conditions, the position which was stated in the case of **David Msangi and Another Vs. National Oil (T) Ltd**, Rev. No. 397 of 2016, Lab. Div. DSM

(unreported). The Learned Counsel was of the view that in the present case there was no existence of any unbearable situation. He stated that, the respondent was called to a management meeting which intended to get the insight or understanding of what was going on in the organization so as to face and avoid bad publicity as testified by DW2.

On the third question he submitted that, the applicant did not create any unbearable situation to the respondent and, recognized her years of servitude by offering her laptop and company phone.

As to the fourth question, Mr. Rahim Mbwambo submitted that there was no likely hood of any intolerable situation to the respondent to continue working, because no one would have chosen to suffer in the alleged intolerable situation for another three month of notice. Addressing to the last question the Learned Counsel submitted that, the respondent had an option of involving the police to handle the investigation but she opted to resign. The learned Counsel submitted that, respondent had also an option or opportunity of pursuing internal grievance procedures or she should have waited for disciplinary action against her if there was any.

Regarding the second ground on record Mr. Rahim Mbwambo submitted that, the Arbitrator awarded the respondent Tshs. 100,000,000/= on the basis of solace an award neither prayed for nor recognized by law. He stated that, the award was issued as a comfort however, the Court of law is not a court of mercy and the amount granted had no legal justification. The learned Counsel strongly submitted that the remedies available for unfair termination are provided under section 40(1) of the Employment and Labour Relations Act [CAP 366 RE 2002] (herein referred as The Act) read together with Rule 32 (2) (5) of the Labour Institutions (Mediation and Arbitration Guidelines) Rules, GN 67 of 2007 (herein referred as Mediation and Arbitration Guidelines).

Mr. Rahim Mbwambo further submitted that, the only evidence in support of the respondent's claim of duress is a letter she gave to her employer on 07/09/2015 (Exhibit P2) a month later after her resignation, which was an afterthought. The Learned Counsel went on to argue that, for a claim of constructive termination to stand there must be a series of acts and conducts at the initiative of the employer causing extreme working conditions necessitating the employee to resign as stated in the case of **TUCTA Vs. Nestory Kilala Ngula**, Rev No. 1172 of 2013, Lab. Div. DSM (unreported). He

therefore prayed for the application to be allowed.

In response to the application Mr. George Magambo submitted that, constructive termination does not always have to manifest sufferings, hostile working environment or torture on the part of the employee, to a smart employer these days and especially after the development of jurisprudence on labour laws, he would simply utter innuendoes such that employee is cornered to find it unworthy to continue working.

The Learned Counsel submitted that, the respondent was forced to resign on a meeting held on 06/08/2015. He stated that the respondent was instructed how she would have to resign and what words she would use in the resignation letter to cover her termination.

Mr. George Magambo went on to submit that, the applicant's conduct of not tendering evidence even when the respondent requested, annoyed and humiliated the respondent as it would do to anyone else. He stated that, the applicant's conducts resulted to the respondent's resignation.

As to the award of Tshs. 100,000,000/= as a solace Mr. George Magambo submitted that, the same was also prayed as general

damages in CMA F1. In conclusion the Learned Counsel stated that, the following events were clearly arranged to disguise constructive termination, so that it could strategically appear as a normal resignation. He submitted that no formal disciplinary meeting was conducted, no charges sheet hearing form was provided to her, no minutes were taken nor provided to her as a record of what transpired during the impromptu meeting between Mike, Dennis and the respondent. He further stated that no proof or evidence was tendered during the informal meeting. He therefore prayed for the application to be dismissed.

In rejoinder Mr. Rahim Mbwambo reiterated his submission in chief.

Having gone through the parties' rival submissions, the Court records, as well as applicable laws with eyes of caution, I find the issues for determination are, whether the respondent was constructively terminated from employment and, to what reliefs are the parties entitled.

As to the first issue the applicant strongly disputed that the respondent was constructively terminated, Mr. Mbwambo submitted that the respondent decided to resign on her own accord. In

determining this issue I fully agree with the submission by Mr. Mbwambo that, for a claim of constructive termination to stand there must be a series of acts and conducts at the initiative of the employer causing extreme intolerable working conditions necessitating the employee to resign. This is also the position of the law provided under Rule 7 of GN 42 of 2007 which provides that:-

> "Rule 7 (1) Where an employer makes an employment intolerable which may result to the resignation of the employee, that resignation amount to forced resignation or constructive termination.
>
> (2) Subject to sub-rule (1), the following circumstances may be considered as sufficient reasons to justify a forced resignation or constructive termination –
>
> (a) sexual harassment or the failure to protect an employee from sexual harassment; and
>
> (b) if an employee has been unfairly dealt with, provided that the employee has utilized the available mechanism to deal

with grievances unless there are good reasons for not doing so.

(3) Where it is established that the employer made employment intolerable as a result of resignation of employee, it shall be legally regarded as termination of employment by employer."

It is on record that the respondent made the decision to resign immediately after she had a meeting with CEO of the Company, Mike Holtham and Dennis Nyorongezwa, a Head group of Copycat Nairobi. The record revealed that, the meeting was held on 06/08/2015 and the respondent wrote a notice of resignation on 07/08/2015 a day after the said meeting. DW1 testified that the intention of the relevant meeting was to have a discussion on the allegation of fraud they had against the respondent. The applicant never tendered any document to prove the alleged fraud as well as any minutes of the meeting in question.

On the other hand the respondent alleged that, in the relevant meeting she was accused of fraud and threatened to be prosecuted if she will not resign on her own. Under such circumstances it is my

view that, in the absence of any minutes for the Court to assess what transpired in the relevant meeting as well as any document proving that the respondent committed the alleged fraud, it draws the inference that the applicant created fear to the respondent that she would be prosecuted. Under such situation the applicant created her employment intolerable and had the decision she took was to resign from her employment. The fact that the applicant intended to prosecute her, created anxiety in her carrier basing on the fact that she held very senior position in the applicant's Company therefore the police case would have ruined her entire carrier which she struggled to build.

From the record it is crystal clear that the applicant dealt with the issue of the alleged committed fraud by the respondent unfairly. The respondent was not given prior notification of the relevant meeting to enable her to prepare for her defense. She was called in a meeting by surprise which left her with no option than to accept the employer's demand. In the email conversation dated 07/09/2015 (Exhibit P2) the respondent communicated her dissatisfaction which resulted to her resignation. She stated as follows:-

> "I must admit that I rushed in the decision I took because of the following reasons:-

- Having served the company for more than 15 years, I was availed no time to look through what was leveled against me.
- I was extremely shocked and disappointed with how this matter was handled in the first place by not even involving me in any hearing or discussion despite of my seniority in the organization.
- I was threatened and put in a position that I had no other alternative option than to resign.
- I was not shown any kind of evidence that I had forged, or was involved in the forgery in any manner.
- I was neither given a chance to express myself orally nor in writing on this matter effectively.
- It is because of the above reasons I felt that according to the prevailing conditions

I cannot work at the Copy Cat Tanzania Limited anymore."

The applicant on the other hand had nothing to add or comment on the above respondent's reasons for termination. Applicant proceeded to approve the respondent's resignation on the reason that, they had prior discussion on the respondent's issues on 06/08/2015 and 07/08/2015. Under such circumstances I fully agree with the Arbitrator's findings that the respondent was forced to resign in her employment. It is also my view that the principles set in the case of **Girango Security Group** (supra) were established and proved in the matter at hand.

On the basis of the above discussion, the Court considers the applicant's conduct of making the respondent's employment intolerable which resulted to termination infringed her right to work as guaranteed by Article 22 (1) of The Constitution of the United Republic of Tanzania, 1977 (as amended from time to time). Also, this Court in the case of **John Msigala Vs. Pan African Energy Tanzania Ltd**, Lab Rev No. 688 of 2018 DSM, (Unreported),

Muruke, J. stated as follows:-

> "Employer should not gamble with One's right to work. To this court "A man's right to work is just as important to him as, if no more important than, his rights of property". Thus, termination of employment must be first substantively fair with fair and valid reasons putting in regards that the concept of Right to work as a component of human rights, is so fundamental and therefore guaranteed by different international legal instruments".

Similarly, the Universal Declaration of Human Rights of 1948 provides for the right to work which is to the effect that:-

> "Article 23 (1) - ... everyone has the right to work to free choice of employment to just and favourable condition of work and to protection against unemployment..."

Again, in the Book titled **African Bishops on Human Rights by Stanislaus Muyemba**, A source Book, Paulines Publications, Africa. It is proclaimed that: -

> "... The right to work includes the right to security and stability of employment. This implies the employee has a right not to lose one's job unfairly. Industrial courts should be instituted to provide legal protection against unfair dismissals and retrenchments. Such incidents are common within the context of privatization as carried out by the government. In case of unjustified and unlawful dismissals, the employee has the right to indemnity or to reinstatement on the job".

On the last issue as to what reliefs are the parties entitled to, before embarking to the issues at hand, let me say that, termination of employment at the employer's will or the right to hire and fire is not part of the Labour Laws of the land. Under the Labour laws of this country the employee has a legitimate right to expect that if everything remains constant, he/she will be in the service throughout the contractual period. That is the basis of the employee having remedy by way of damages, compensation and reinstatement orders when such right is breached by the employer. This was the Court's

position in the case of **Sophia Majamba Vs. Stanbic Bank**, Rev. No. 767 of 2018, Lab. Div. DSM (unreported).

The applicant alleged that the Arbitrator awarded the respondent Tshs. 100,000.000/= as a solace the relief which was never prayed by the respondent in CMA Form No. 1. Under such circumstance I will direct my mind to what is contained in the CMA form No. 1 on record, which basically sets out the relief sought by the respondent. The CMA Form No.1 of the respondent is very clear on what the respondent claimed for. Respondent herein suggested a fair solution to the dispute is reinstatement and general damages for the breach of contract amounting to Tshs. 100.000.000/=.

As to the claim of reinstatement I fully agree with the Arbitrator's reasoning that under the circumstances of this case an order for reinstatement will lead to more antagonistic relations with the employer. However it is my view that, the Arbitrator was bound to resort to other remedies stipulated under section 40 of the Act read together with Rule 32(2)(5) of the Mediation and Arbitration Guidelines because the remedies provided in those provisions does not affect other rights/claims of an employee. Therefore since it is proved that the respondent was constructively terminated from her

employment and she cannot be reinstated as discussed, then she is entitled to 12 months salaries compensation as stipulated under section 40 (1) (c) of the Act.

On the issue of damages, it is my view that the Arbitrator awarded the respondent Tshs 100.000.000/= as damages, the word solace was only used to justify such an award.

In the case at hand, the fact that the respondent was in a higher position in her employment I believe it is difficult to acquire another job opportunity of the same higher position she held before her termination. I fully agree and confirm the Arbitrator's finding that the award of Tshs. 100,000,000/= as general damages is appropriate because that is an amount the respondent would have earned if she was not constructively terminated. The respondent also tendered medical documents (Exhibit P1) to prove that she felt sick as a result of the applicant's conduct. As cited in the cases above her right to work infringed by the applicant is of paramount importance in one's life, thus the award of general damages for breach of a permanent contract is reasonable.

Having established that the employer, applicant made the employment intolerable as a result of resignation of employee,

respondent as discussed above, I do not hesitate to say such resignation legally amount to termination of employment by applicant.

In the result the application has no merit and I find no reason to fault the Arbitrator's award. The Arbitrator's award is hereby upheld and the applicant is also ordered to pay the respondent 12 months compensation for unfair termination in addition to general damages of Tshs 100,000,000/=. It is so ordered.

I.D. Aboud

JUDGE

04/09/2020