

TANZANIA / JUDGMENT

# ally a mbonde 2 others vs core phamacy ltd 2023 tzhcld 1141 14 february 2023

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IN THE HIGH COURT OF TANZANIA LABOUR DIVISION AT DAR ES SALAAM REVISION  
APPLICATION NO. 402 OF 2022 (Arising from an Award issued on 7/10/2022 by Hon. Msina , H.H.,  
Arbitrator in Labour Dispute No CMA/DSM/ILA/36/21/154/21 at Ilala) ALLY A. MBONDE & 2  
OTHERS .....APPLICANTS VERSUS CORE PHARMACY  
LTD..... RESPONDENT

## JUDGMENT

Date of Last Order: 09/02/2023 Date of Judgement: 14/02/2023 B.E.K. Mganga, J. Brief facts of this application are that on different dates Applicants entered into employment relationship with the respondent. It is undisputed that on 8th July 2017 respondent employed Ally Mbonde, the 1st as a driver. It is also undisputed that on 18th February 2019, respondent employed Masoud Yusuph Bendera, the second applicant also as a driver. It is further undisputed that on 8th April 2019 respondent employed Joel Filipo, the third applicant as a packager. It is said that on 26th May 2021 theft occurred at the place of work of the respondent as a result property valued at 6,504,5000/= was stolen. Due to that theft, a total of five employees including applicants were arrested 1 and sent at police. On 27th May 2021, applicant and the two other employees who are not party to this application were released from custody. On 03rd September 2021 applicants filed Labour Dispute No CMA/DSM/ILA/36/21/154/21 before the Commission for Mediation and Arbitration henceforth CMA at Ilala claiming to be paid their unpaid salaries. On 7th October 2022, Hon. Msina, H.H, Arbitrator, having heard evidence and submissions of the parties, awarded the 1st and 2nd applicants to be paid TZS 300,000/= each and the 3 rd applicant to be paid TZS 200,000/= being salary for May 2021. The Arbitrator found that respondent did not suspend the applicants and that they were not entitled to be paid any other salary apart from the salary for the month of May 2021 as they failed to prove their claims. Applicants were aggrieved with the award hence this application for revision. In their joint affidavit in support of the application, applicants raised two grounds namely:-

1. The arbitrator erred law in law and facts for not awarding the applicants to be paid their salaries on ground that they stopped to go at work while there was no proof.

2. That the arbitrator erred in law and fact for not considering weight of evidence adduced. In opposing the application, respondent filed the counter affidavit of Faudhia Ismail Abdallah, her Human Resources officer. 2 When the application was called on for hearing, applicants were represented by Edward Simkoko, their representative from TASIWU, a trade union, while respondent was represented by Thomas Brash, learned advocate. Arguing the 1st ground, Mr. Simkoko submitted that respondent did not pay applicants their salaries because theft occurred at their place of work. He submitted further that applicants were arrested, sent at police and verbally interdicted. He added that, in their evidence, applicants testified that respondent decided not to pay their salary because there was a pending criminal case. Simkoko strongly submitted that evidence adduced by both side at CMA shows that applicants were interdicted but the arbitrator in the award held that applicants willfully stopped to attend at work as a result the arbitrator reached a wrong

### **conclusion.**

On the 2nd ground, Mr. Simkoko submitted that, in their evidence, applicants did not admit to repay the money that was stolen and that the Arbitrator relied on unsigned exhibit D1, which its author is unknown to hold that applicants agreed to repay the money. It was submission of Mr. Simkoko that Applicants were claiming to be paid TZS. 6,400,000/=. Mr. Simkoko argued that there is a criminal case pending at Msimbazi police station against the applicants and that, in terms of section 37 (5) of the Employment and Labour Relations Act [Cap. 366 R.E 2019], respondent was prohibited to take disciplinary action against the applicants who were facing a criminal case. He argued further that, the said section covers even situations when the case is still under investigation prior to filing charges in court. He therefore prayed that the application be allowed, CMA award be quashed and order respondent to pay TZS 6,400,000/= to the applicant as their unpaid salaries. On his part, Mr. Brash, learned counsel for the respondent, submitted generally that the matter that was before CMA was a dispute relating to termination of employment of the applicants and failure by the respondent to pay their salaries. Counsel for the respondent submitted further that it was the duty of the applicants to prove their claims but they didn't. He supported the findings of the arbitrator that applicants willfully stopped to attend at work. Mr. Brash referred the court to exhibit D1 and submit that applicants agreed to repay the money stolen as was testified by DW1 Fauzia Abdallah. He therefore prayed that the application be dismissed for want of merit. In rejoinder Mr. Simkoko reiterated his submission in chief and prayed that the application be granted. 4 I have examined evidence in the CMA record and considered submissions of the parties and wish from the outset, to point out that applicants did not file the dispute relating to both termination of employment and claim of unpaid salaries, rather, their claim was for unpaid salaries only. The Referral Form (CMA F1) that was signed and filed by Ally Abdallah Mbonde on behalf of the applicants shows that their claim was for unpaid salaries only. Therefore, submissions by counsel for the respondent that applicants filed the dispute for both unfair termination and for unpaid salaries cannot be valid. It was submitted by Mr. Simkoko that applicants were suspended from work but counsel for the respondent argued that they willfully stopped attending at work. I have examined evidence of Masudi Yusuf Bendera

(PW1) the only witness who testified on behalf of the applicants and Faudhia Ismail Abdallah(DW1) the only witness who testified on behalf of the respondent and I am of the settled view that respondents were not suspended but stopped attending at work. Having so held, I am of the view that applicants are not entitled to be paid salary they have not worked for. This Court held in the case of Feruzi Hanzuruni vs. Supper Service Centre Co. Ltd, Rev. No.125 of 2020 held that:- 5 “...much as employees needs protection, the same also need to be extended to employers otherwise their business will be affected by none attendance at work by employees who, in turn, will demand salaries of which they have not worked for. This may lead to unfair enrichment by employees to the detriment of their employers.” I totally subscribe to that holding and associated myself with that reasoning. I have examined evidence adduced at CMA and it is clear in my mind that applicants admitted to repay the money as evidenced by exhibit D1. It was submitted by Mr. Simkoko that exhibit D1 was unsigned and that its author is unknown. With due respect to him, I have examined the said exhibit D1 and find that it was signed by all applicants. More so, the argument that the said exhibit D1 was unsigned and that its author is unknown was not raised at CMA at the time it was tendered by DW1. That argument cannot be entertained at this stage. Mr. Simkoko referred the court to the provision of section 37(5) of Cap 366 R.E 2007(supra) and submit that the said section prohibits an employer to take disciplinary action against an employee who is being investigated but no charges filed in court. With due respect to Mr. Simkoko, that is not a correct position of the law. The said section 6 applies only when an employee is charged in court. That section clearly provides :- “37(5) No disciplinary action in form of penalty, termination or dismissal shall lie upon an employee who has been charged with a criminal offence which is substantially the same until final determination by the Court and any appeal thereto.” The said section is clear and unambiguous. It does not cover employees who are being investigated. In his evidence, PW1 did not testify that they were charged in court for the said section to apply. Again, no evidence was adduced by the applicants to show that respondent took disciplinary action against them. I therefore find submissions by Mr. Simkoko unmerited. It was submitted on behalf of the applicants that evidence proved the case against the respondent that applicants were claiming for unpaid salaries. I should point out that the amount of unpaid salary applicants were claiming was neither stated in the CMA F1 nor in PW1’s evidence. In his submissions, Mr. Simkoko on behalf of the applicants submitted that applicants were claiming to be paid TZS 6,400,000/= as unpaid salaries. With due respect, that claim is not supported by evidence. As pointed hereinabove, I have read the evidence of Masudi Yusuf Bendera (PW1) the only witness who testified on behalf of the applicants and find 7 that he did not state the amount the parties were claiming as unpaid salaries. Since the amount of unpaid salaries were not reflected in the CMA F1 that is a pleading and was not stated in evidence of Masudi Yusuf Bendera (PW1), I entirely agree with the findings of the arbitrator that applicants did not prove their case. They had a duty to prove the allegations against the respondent. For the foregoing, I find that the application is devoid of merit and hereby dismiss it. Dated in Dar es Salaam on this 14th February 2023. B. E. K. Mganga JUDGE Judgment delivered on this 14th February 2023 in chambers in the presence of Masudi Yusuf Bendera, the 2nd Applicant and Joel Filipo Kanemile, the 3rd Applicant but in the absence of the Respondent. B. E. K. Mganga JUDGE 8

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