

TANZANIA / JUDGMENT

emmanuel zephania makoye vs kk security company ltd 2021 tzhcld 125 27 may 2021

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IN THE HIGH COURT OF TANZANIA LABOUR DIVISION PAR ES SALAAM REVISION NO. 592 OF 2019 BETWEEN EMMANUEL ZEPHANIA MAKOYE..... APPLICANT VERSUS KK SECURITY COMPANY LTD..... RESPONDENT

JUDGEMENT

Date of Last Order: 06/05/2021 Date of Judgement: 27/05/2021 Aboud, J. The applicant, filed the present application seeking revision of the decision of the Commission for Mediation and Arbitration (herein CMA) delivered on 24/05/2019 by Hon. Mbeni. M.S, Arbitrator in Labour Dispute No. CMA/DSM/ILA/962/18/248. The application is made under section 91 (1) (a), 94 (1) (b) (i) and section 91 (2) (c) of the Employment and Labour Relations Act [CAP 366 RE 2019] (herein referred as the Act), Rule 24 (1) 24 (2) (a) (b) (c) (d) (e) (f) 24 (3)

- (a) (b) (c) (d) of the Labour Court Rules GN. No. 106 of 2007 (herein referred as the Labour Court Rules). i The matter originated from the following background; the applicant was employed by the respondent through letter of offer dated 28/12/2018 (exhibit E1) as a Security Officer stationed at Dar es Salaam. Later on March, 2018 the applicant was transferred to Njombe. Again, on July, 2018 the applicant was transferred back to Dar es Salaam where he refused to go until when he was summoned to Disciplinary Hearing in Dar es Salaam. At the Disciplinary hearing the applicant was charged and found guilty of failure to comply with the respondent's movement order. The Disciplinary Committee recommended the applicant to be warned for the committed misconduct. Thereafter the applicant was ordered to comply with the respondent's movement order and report to work at Dar es Salaam. On 14/09/2018 the applicant referred the dispute at the CMA claiming for outstanding salaries of July and August 2018 up to the date of the judgement/decreed as well as reallocation allowances of 24 days onwards. At the CMA both parties were heard and presented their evidence. On her findings, the Arbitrator was of the view that the applicant failed to substantiate his claims thus, his application did not succeed. Aggrieved by the Arbitrator's award the applicant filed 2 the present application moving the court to determine the following issues:-

- (i) Whether the Arbitrator legally and correctly considered the documentary evidence of the applicant. (ii) Whether it was proper to award by relying upon non existing document. (iii) Whether the Arbitrator was correct to dismiss the claims in CMA Fl. The matter was argued orally where the applicant appeared in person, unrepresented while Mrs. Neema Ndossi, Learned Counsel was for the Respondent. Arguing in support of the application the applicant submitted that, he was the employee of KK security from 28/12/2017 later on in March, 2018 he was transferred to Njombe. The applicant stated that on 04/08/2018 he was summoned to appear before the Disciplinary Hearing Committee in Dar es Salaam where from 05/08/2018 to 20/08/2018 he was paid allowances as per diem. It was further submitted that the Disciplinary hearing ended on 20/08/2018 and the Committee recommended the applicant to be warned. It was stated that the chairman of the Committee did not forward the Committee's recommendations to the Disciplinary Authority that is the Human Resource Manager of the respondent. The applicant submitted that he appealed against the Committee's findings to the Human Resource Manager unfortunately there is no response to date. It was further submitted that, at the CMA the Arbitrator considered that the respondent was paying the applicant salary through bank (NMB), therefore it was found that, the evidence of salary slips tendered by the respondent was sufficient to prove payment of the applicant's claims. The applicant strongly submitted that he did not receive any salary from July, 2018 to date. He added that he is still working as an employee of the respondent. It was also submitted that, the Arbitrator erred in fact by changing the movement order to transfer letter. It was argued that movement order was meant to be a permission to travel from Njombe to Dar es Salaam while transfer letter is the document which orders someone to move from one working station to another. The applicant strongly contended that he was not transferred by the alleged movement order which the Arbitrator relied upon to make her decision. 4 Moreover, it was submitted that, the Arbitrator erred in fact by considering that the applicant was paid transport allowance of Tshs. 255,000/= for the alleged transfer while that was not the position. It was further argued that, it was wrong for the Arbitrator to decide that the applicant did not brought sufficient evidence to prove his claims while the same was proved by exhibit KK4. It was added that, the respondent did not pay the applicant's salary because there was some misleading information that he was sick, the information which is not true. In the upshot the applicant prayed for the application to be allowed. Responding to the application Mrs. Neema Ndossi adopted the respondent's counter affidavit to form part of his submission. She submitted that, it is true that the applicant was an employee of the respondent and his salary was Tshs. 150,000/= per month. She stated that on 27/02/2018 the applicant was given movement order from Dar es Salaam to Njombe where he continues to work for the same salary and in addition, he was paid out of station allowance of Tshs. 30,000/=. The Learned Counsel went on to submit that, later on the respondent decided to move the applicant back to Dar es Salaam 5 where he sent him a movement order which was not honoured by the applicant. It was further submitted that the respondent sent the second movement order to the applicant reminding him to report to Dar es Salaam, informed him that he will not be paid out of station allowances anymore but he will receive his salary as usual. The Learned Counsel added that the movement order also

notified the applicant that, he will be paid reallocation allowances of seven days while in Dar es Salaam. Furthermore, it was submitted that, the second movement order was sent together with the notice to attend Disciplinary Hearing. She stated that the verdict of the Disciplinary Hearing Committee was issuance of written warning to the applicant and he was issued the same accordingly. It was submitted that despite such warning the applicant absconded from work until to date. Regarding the applicant's claims it was submitted that, the respondent tendered salary slips (exhibit KI) to prove payment of the claims in question. It was argued that the applicant ought to have tendered evidence to rebut the respondent's evidence. It was further argued that, the general rule demands the one alleging must prove 6 as in accordance with section 110 of the Evidence Act, Cap 6 RE 2019. It was strongly submitted that, the Arbitrator correctly evaluated and considered the documentary evidence tendered in this case. With respect to the reallocation allowance, it was submitted that the applicant was paid the same in his account as it is reflected at page 2 of the award. The Learned Counsel added that, the applicant did not prove his allegation that when he was transferred to Njombe he was given transfer letter. It was stated that, the applicant was moved to Njombe temporary just for four months that it was not a transfer as claimed. She therefore prayed for the application to be dismissed for lack of merit. In rejoinder the applicant submitted that, movement orders were not transfer letters. He added that the movement orders in question were forget and the respondent himself does not recognize them. The applicant strongly submitted that, he was not paid any transfer allowances when he was transferred to Njombe and it is not true that his transfer was just a temporary reallocation. He therefore urged the court to grant the application. 7 Having considered parties submissions, court records as well as relevant applicable labour laws and practice with eyes of caution, I find the key issue for determination is whether the applicant adduced sufficient evidence to prove his claims. It is a well-established principle of law that in any proceeding concerning unfair termination of the employment by the employer, the burden of proof lies on the employer to prove that the termination is fair as per requirement of section 39 of the Act, I quote:-

39. in any proceedings concerning unfair termination of an employee by an employer, the employer shall prove that the termination is fair'. The application at hand was specifically for claims of unpaid salaries and reallocation allowances. In such circumstances it is crystal clear that the employer had no obligation to prove the same because it was not a dispute of unfair termination as required by the provision quoted above. As rightly submitted by the respondent's Counsel it is the duty of the applicant to prove his claim as it is the 8 requirement of section 110 of the Evidence Act which provides as follows:- 'Section 110 (1) Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist'. The applicant is urging the Court to order the respondent to pay him unpaid salaries from July 2018 to date and 24 days reallocation allowances. As to payment of salaries of July and August 2018 the respondent tendered pay in slip (exhibit KI) to prove payment of the same. On his part the applicant did not tender any evidence to rebut the respondent's evidence. Under such

circumstances, I have no hesitation to fully agree with the Arbitrator's finding that the applicant did not prove such claim. As to the claim of other salaries from September, 2018 to date, the record shows that the applicant did not report to work since when he was officially moved from Njombe to Dar es Salaam in 01/07/2017 as reflected in the movement order, exhibit E3. That being the case it is my view that, the applicant is not entitled to payment of salaries which he has not worked for. He did not report to work at the 9 respondent's office therefore, he is not entitled to be paid any salaries or remuneration whatsoever. I have noted the applicant's submission that he was not served with the transfer letter, in my view the content of the disputed movement order suffices to be termed as a transfer letter. For easy of reference, I hereunder reproduce the relevant movement order:-

MOVEMENT ORDER To:
EMMANUEL ZEPHANIA MAKOYE Staff No: 1 7980 Current Position: SO You have been officially moved from Unilever Project In Njombe to commercial Dar es Salaam stWtjno effectively from 01 July 2018. Reportinn date at HR Department Dar will be Z.Sff/O. r7./r2.ft Time: . . ST, £C..... Kindly report to Human Resources Department —Dar es Salaam and see Madati Morice. for further instructions regarding your pending Disciplinary hearing Kindly take a note that, you will no longer be entitled to any Unilever Project monthly allowances/ Out of station allowance starting from 1" July 2018. Your monthly basic pay will remain the same as per your signed permanent employment contract You will be paid the bus fare from Njombe to Dar es Salaam You will also be paid reallocation allowance T.sh 30.000 for the seven days which is equal to T.sh 210.000 to assist you with food and accommodation while you are looking for your own permanent accommodation in Dar os Salaam. Kindly advice your directly reporting Supervisor on your personal effects transportation needs within two days of receiving this movement order Authorized by: - Name: - Designation: - Signature: < . . ^Jrf.declare to have read and understood the contents hero In to the best of my knowledge and I accept S Ignature.... .V.TVT?..?..... Date . / v.7. /'2-. f. Note: Failure to comply and report to Operations Department — HQ at the date Indicated without proper reason prior communication will result In to a severe disciplinary action. NB: THIS MOVEMENT ORDER IS STRICTLY LIMITED TO THE PERSON AND ROUTE STIPULATED THERE IN. ANY DEVIATION FROM CONTENTS THEREOF WILL BE DEEMEDAS BREACH OF LEGAL LABOUR REGULATIONS. PROCEDURES AND LAWS LIABLE FOR DISCIPLINARY ACTION. 10 Regarding the payment of 24 days reallocation allowance, the same is also unproved. As reflected in the movement order, the applicant was promised to be paid reallocation allowance for seven days, Tshs. 30,000/= per day which is equal to Tshs. 210,000/= and, the same was paid to him. There is no any evidence of agreement of the additional 24 days claimed by the applicant. Thus, his claim has no legal basis. In the result, it is found that the applicant failed to substantiate his claims, hence the application goes with smoke because has no merit. Consequently, the Arbitrator's award is hereby confirmed. The application is dismissed accordingly. / * (n i (—"T v 1 A I.D. Aboud

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