

TANZANIA / JUDGMENT

enock paschal mbepera vs mfilis mbicu 1993 2023 tzhc 15669 23 february 2023

COURT
TZHCDECIDED
23 February 2023

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IN THE HIGH COURT OF TANZANIA (SONGEA DISTRICT REGISTRY) AT SONGEA LABOUR
REVISION NO. 4 OF 2022 ENOCK PASCHAL MBEPERA APPLICANT
VERSUS MFI LIS MBICU (1993) LTD RESPONDENT

JUDGMENT

09/02/2023 & 23/02/2023 E. B. LUVANDA, J. The Applicant above mentioned is aggrieved by the decision of the Commission for Mediation and Arbitration (C.M.A.) which dismissed his claim for subsistence allowance TZs. 47,872,241 and arrears of salaries a sum of TZs. 245,200/=, for want of proof. In the affidavit in support for revision, the deponent was too wordy, but essentially he blamed the Arbitrator for terming his claim as subsistence allowance while claim was for underpayment. He complained that he was not given copies of exhibit D1, D2, D3, D4 and D5 and that some documents were not tendered by the Respondent. The deponent heaped blame to the Respondent for negligence and failure to pay his amount due from 12/8/1997 to 2015 when he was paid less sum of TZs. 146,860 and 30,650, which is according to him form a base for his claim for subsistence allowance aforementioned. He prayed for the court to set aside the award and make an order for him to be compensated his claim. The revision was argued by way of written submission. The Applicant who was unrepresented, presented his submission but it was not easy to comprehend his line of argument. The Applicant twisted his submission into ecclesiology arena, by making a lot of quotations from verses of the Holy Bible, asserted allegations of false information on the part of the Respondent being a liar. Accused the Arbitrator for biasness, favouritism, lying and evilish. That the Arbitrator failed to decide his case. He submitted that at the time of termination he was not paid his salaries from January to August 1997, due to economic hardship facing his employer. In reply, Mr. Nestory E. Nyoni learned Advocate for the Respondent submitted that the Applicant failed to adduce sufficient grounds to move the court to revise the award of C.M.A., rather is seeking mercy of the court without showing reasonable reasons. He submitted that the Applicant was given and shown documents before it was admitted as revealed from pages 10 to 12 of the typed proceedings of the C.M.A. As to the argument that the Respondent did not tender all documents intimated to rely upon, the learned Counsel for Respondent submitted that there is no law which require the Respondent to tender all the documents which were mentioned by the Respondent in the opening statement. He submitted

that the allegation of corruptness on the part of Arbitrator require proof and cannot be used as a ground for revision at this stage, as it was not proved. He cited Danford Evans Omari vs Tazama Pipe Line Limited, Revision No. 684/2019 High Court Labour Division at Dar es Salaam. He submitted that the Applicant failed to prove his claim for arrears of salaries from January to August 1997, due to the reason that the Applicant failed to adduce evidence to support his claim, neither tendered any documents, nor called any witness. Regarding a claim for subsistence allowance, the learned Counsel for Respondent submitted that the Arbitrator was correct to decide the issue of substance allowance basing on section 43(1) of the Employment and Labour Relations Act, No. 1 of 2001 which require the employee to be paid it by his employer if the contract is terminated at a place other than where the employee was recruited. On rejoinder, the Applicant instead of re-joining issues and grounds advanced by the learned Counsel for Respondent, he was instead unfocused, repeating segment of evils, delayment, injustice, lying. The 3 Applicant submitted that he was denied to have the exhibits as the Respondent tendered only five exhibits out of ten mentioned in the opening statement of the Respondent dated 11/2/2022, which amount to lying. Starting with a claim for subsistence allowance at a tune of TZs. 47, 872, 241, basically the Arbitrator is faulted for nothing. In his evidence, during cross examination the Applicant stated that a place of his engagement and termination was at Mbinga District. Now, I wonder as to where the Applicant wanted to be repatriated, while he was recruited within the vicinity of his original domicile and his tenure was terminated at the same locality or place. Section 43 (1) (c) of Employment and Labour Relation Act No.6/2004, provide, I quote, '43 (1) where an employee's contract o f employment is terminated at a place other than where the employee was recruited, the employer shall either -

(a) ... NA.....

(b) NA....

(c) Pay the employee an allowance for transportation to the place o f recruitment in accordance with subsection (2) and daily subsistence expenses during the period, if any, between the date o f transporting the employee and his family to the place o f recruitment.' The Applicant whose place of engagement was at Mbinga and place of termination at Mbinga, such allowance is not available to him. Therefore the Arbitrator was justified to reject it. Regarding a claim for arrears of salaries for January to August 1997, inclusive. It is true that when the Applicant was asked question by the Arbitrator, he stated that he never raised a claim of arrears of salaries to his erstwhile employer (MBICU) after termination, rather he raised it to the liquidator (Respondent). But according to the records in the file of CMA, portray that the Applicant had raised this claim to the Respondent the way back on 28/9/1999 being two years after termination to wit on 12/8/1997. It is to be noted that a letter for termination dated 12/8/1997, which the Arbitrator premised his findings to disallow the claim for arrears of salaries, nowhere stated that the Applicant should present his claim if any. Rather the Applicant was only asked to liaise with the chief accountant of MBICU in case he was indebted by MBICU in a form of staff loan, advance salary, and unretired impress, in view of reconciling to eliminate the Applicant's due being deducted

unwarrantedly. It is to be noted that the said letter contained a caveat, to the following wording, I quote for easy of reference, yKwa kuwa haii ya Union sio nzuri kifiedha malipo unayostahili yatalipwa kwako pindi Union yetu itakapokuwa na haii nzuri kifiedha' In the circumstances, it will be unjust to fault the Applicant for his late submission. Importantly the said letter suggest that by the time of drafting, the Applicant was under suspension (interdiction) for some disciplinary proceedings, where he was cleared by the general meeting dated 7/12/1996 to 8/12/1996 and a meeting of MBICU Council convened on 11/8/1997. The said letter is silent as to the entitlement of the Applicant between the period of December 1996 to August 1997. In the circumstances explained above, and so far thereafter MBICU went under liquidation, a call for a proof of arrears of salary from the Applicant's erstwhile employer (MBICU), as envisaged in a letter exhibit D3 and D4, surely is unrealistic. I therefore rule that a claim for arrears of salaries from January to August 1997, inclusive, a sum of TZs. 245,200.00 was established on the balance of probability, indicating that were unpaid. Therefore the award of CMA in this respect is set aside. The Applicant is entitled to be paid a sum of TZs. 245,200.00. 6 It is accordingly adjudged.

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