

TANZANIA / JUDGMENT

steven chambo kivuma vs karen general supply 2024 tzhcld 4 13 february 2024

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IN THE HIGH COURT OF TANZANIA LABOUR DIVISION AT DAR ES SALAAM REVISION
APPLICATION NO. 215 OF 2023 (Arising from an Award issued on 28th July, 2023 by Hon.
Mbeyale, R, Arbitrator, in Labour Dispute No. CMA/DSM/KIN 12/21/52/21 at Kinondoni) STEVEN
CHAMBO KIVUMA APPLICANT VERSUS KAREN GENERAL SUPPLY
..... RESPONDENT

JUDGMENT

Date of last Order: 07/02/2024 Date of Judgement: 13/02/2024 B. E. K. Mganga, J. It is undisputed by the parties that initially, Steven Chambo Kivuma, the herein applicant, had a written fixed term contract of employment with Karen General Supply, the herein respondent where he was employed as security guard. It is said by the applicant that the said written fixed term contract commenced on 1st April 2013, but respondent terminated it on 31st March 2015. It is alleged by the applicant that, after termination of the said written fixed term contract, the two entered oral unspecified period contract of employment. It is alleged by the applicant that, on 1st April 2021, respondent terminated the said oral unspecified period contract of employment. On 9th April 1 2021, applicant filed Labour dispute No. CMA/DSM/KIN/2/21 before the Commission for Mediation and Arbitration(CMA) at Kinondoni complaining that respondent terminated his employment unfairly. In the Referral Form(CMA F1), applicant indicated that he was claiming to be paid TZS 6,427,589/= being terminal benefits, un-paid salaries, compensation for unfair termination, general damages and overtime pay. The basis of that claim was that, respondent did not comply with fair procedure of termination of employment and further that, there was no valid reason for termination of his employment. Having heard evidence of the applicant exparte, on 28th July 2023, Hon. Mbeyale, R, Arbitrator, issued an award dismissing the claims of the applicant. In the said award, the arbitrator held that there was no oral unspecified period contract of employment between the applicant and the respondent and further that the claim for un-paid salaries were time barred because there was no application for condonation that was granted. Aggrieved with the said CMA award, on 12th September 2023, applicant filed this application for revision. In the affidavit in support of the application, applicant raised two grounds namely:-

1. That, the honourable arbitrator erred in law and facts by holding that the applicant's employment had come to an end on 31/03/2015 without 2 considering that exhibits P1, P2, P3 and P4 shows that the applicant was an employee of the respondent until 2017.
 2. That, the honourable arbitrator erred in law and facts by holding that applicant did not prove termination of his employment without considering the requirements of the labour law. Respondent opposed the application by filing the Counter Affidavit sworn by Daniel Joseph Msuya, her Principal Officer. By consent of the parties, this application was argued by way of written submissions. In arguing the application, applicant enjoyed the service of Edward Simkoko, his personal representative while respondent enjoyed the service of Daniel Bushele John, Advocate. Arguing the 1st ground, Mr. Simkoko submitted that, salary slips for December 2016 and January 2017(exhibit P1), identity card (exhibit P2), attendance register (exhibit P3) and a letter dated 31st March 2021(exhibit P4) proves that applicant continued to work under oral contract as employee of the respondent after termination of his employment on 31st March 2015. On the second ground, Mr. Simkoko submitted that, applicant stated in his testimony that he was unfairly terminated by the respondent. He added that respondent had a duty to prove whether termination was fair or not and not the applicant. He argued further that, the findings by the arbitrator that applicant failed to prove that 3 respondent terminated his employment was contrary to section 39 of the Employment and Labour Relations Act [Cap. 366 R.E. 2019] that requires the employer to prove fairness of termination of employment. Mr. Simkoko also submitted that, the arbitrator failed to elaborate as to whether, employment of the applicant ended in 2015 because evidence shows that applicant continued to work until in 2021. For the foregoing, Mr. Simkoko prayed the court to revise and set aside the CMA award and order respondent to pay TZS. 6,427,589/= to the applicant as compensation for unfair termination and as his terminal benefits. Responding to the 1st ground of application, Mr. Bushele submitted that, in his evidence, applicant stated that his employment ended in
2015. Counsel argued that, there was no new contract of employment that the two entered after termination of the contract in 2015. On the 2nd ground, counsel for the respondent submitted that applicant had a duty to prove that there was employment contract and that, the same was terminated by the respondent. He added that, applicant failed to prove his case at the balance of probability and cited the case of Godfrey Sayi vs Anna Siame as legal representative of the late Mary Mndolwa, Civil Appeal No. 114 of 2021, CAT (unreported) and Anthon M. Massanga vs Penina (Mama Ngesi) 4 and Another, Civil Appeal No. 118 of 2014 (unreported) all relating on duty and standard of proof in civil cases. Counsel for the respondent concluded his submissions by praying the court to dismiss this application with costs. I have examined evidence of the applicant that he adduced at CMA and considered rival submissions of the parties in this application and find that, the main issue is when was employment of the applicant terminated. It was indicated by the applicant in the Referral Form (CMA F1) that his employment commenced on 2nd July 2017 but was terminated on 1st April 2021. But, in his evidence, Steven Chambo Kivuma(PW1), applicant, the only witness who testified at CMA as the dispute was heard exparte, stated that his employment

commenced on 1st April 2015 and that it was terminated in December 2020. As proof of termination of his employment, applicant tendered a letter dated 31st March 2021(exhibit P4). In his own words, applicant(PW1) is recorded stating:- "...Nilianza kazi 1/4/2015 kwa mlalamikiwa ambapo kazi zangu ilikuwa ni ulinzi...Niliachisha kazi katikati ya mwezi December 2020. Ninayo barua iliyoonyesha mimi si mfanyakazi wake tena wakati anajua mimi ni mfanyakazi wake..." It is clear from the above evidence that, applicant departed from his pleading namely, CMA F1 wherein he stated that his employment 5 with the respondent commenced on 2nd July 2017 but was terminated on 1st April 2021. In his evidence, applicant was supposed to adduce evidence showing that his employment commenced on 2nd July 2017 and that it was terminated on 1st April 2021 as he indicated in the CMA F1 that is his pleadings. I am of that settled opinion because, there is a litany of cases that, parties are bound by their own pleadings, and they are not supposed to depart therefrom. See the case of Astepro Investment Co. Ltd vs Jawinga Co. Ltd (Civil Appeal 8 of 2015)

[2018] TZCA 278 -Tanzlii, YARA Tanzania Limited vs Ikuwo General Enterprises Limited (Civil Appeal 309 of 2019) [2022] TZCA 604 -Tanzlii, Ernest Sebastian Mbele vs Sebastian Sebastian Mbele & Others (Civil Appeal 66 of 2019) [2021] TZCA 168-Tanzlii, Salim Said Mtomekela vs Mohamed Abdallah Mohamed (Civil Appeal 149 of 2019) [2023] TZCA 15 - Tanzlii, Charles Richard Kombe T/a Building vs Evarani Mtungi & Others (Civil Appeal 38 of 2012)

[2017] TZCA 153-Tanzlii and Barclays Bank T. Ltd vs Jacob Muro, Civil Appeal No. 357 of 2019 [2020] TZCA 1875, and Registered Trustees of Islamic Propagation Center (ipc) vs The Registered Islamic Center (tic) of Thaaqib Trustees (Civil Appeal 2 of 2020)

[2021] TZCA 342 (27 July 2021) to mention but a few. In the IPC's case supra, the Court of Appeal held inter-alia that:- 6 "As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings ... For the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation." In the application at hand, applicant was bound by his pleading in the CMA F1 wherein he indicated that his employment commenced on 2nd July 2017 and that it was terminated on 1st April 2021. Since he departed from his pleadings, I agree with the arbitrator, but for a different reason, that, applicant did not prove his case at the balance of probability. More so, the letter (exhibit P4) that applicant tendered to show that his employment was terminated on 1st April 2021, did not state that respondent

terminated his employment on that date. The said letter(exhibit P4) is not a termination letter so to speak, rather, is just clarifications that was done on 31st March 2021 by the respondent to the Tanzania Social Services Industry Workers Union(TASIWU), a Trade 7 Union. The said letter (exhibit P4) shows that applicant's employment was terminated on 31st March 2015 and not 1st April 2021. In fact, there is no indication in the said letter (exhibit P4) that applicant's employment was terminated on 1st April 2021. I have carefully examined the said letter (exhibit P4) and find that, it was endorsed by handwriting "Nimepokea leo 01/04/2021" to mean it was received on 01/4/2021. The person who made those indorsements is not known and it was not stated by the applicant in his evidence that he is the one who made those endorsement. Worse, the said letter was neither addressed nor copied to the applicant. Be as it may, the said letter (exhibit P4) cannot prove that employment of the applicant was terminated on 01st April 2021. Since in his evidence applicant(PW1) stated that his employment was terminated in the middle of December 2020, but the dispute was filed at CMA on 09th April 2021, I find that the dispute was time barred. Applicant was supposed to file the dispute at CMA within 30 days from the date of termination of his employment as provided for under Rule 10(1) of the Labour Institutions (Mediation and Arbitration) Rules, GN. No. 64 of 2007. It is clear that in the award, the arbitrator held that the claim for un-paid salaries was time barred as it was filed out of the 60 days provided for under Rule 10(2) of GN. No. 64 of 2007(supra). I 8 entirely agree with her findings. In my view, had the arbitrator carefully scrutinized and considered the above quoted evidence of the applicant, she could have also found that the whole dispute was time barred because applicant admitted in his evidence that there was no application for condonation that was granted. Mr. Simkoko has criticized the arbitrator for holding that applicant did not prove his case. Mr. Simkoko relied on the provisions of section 39 of Cap. 366 R.E. 2019(supra) to criticize the findings of the arbitrator. It is my view that, in the circumstances of the application at hand, the arbitrator deserves no criticism. I am of that view because, applicant had a duty to prove by evidence that his employment was terminated on 1st April 2021. It has been held several times both by this Court and the Court of Appeal that, he who alleges must prove. See the case of Barelia Karangirangi vs Asteria Nyalambwa (Civil Appeal 237 of

2015) [2019] TZCA 51 (1 April 2019) and Oliva James Sadatally vs Stanbic Bank Tanzania Limited (Civil Appeal 84 of 2019) [2022] TZCA 388 (17 June 2022). That is the general principle. It was the duty of the applicant to prove first, the date of termination of his employment before the burden of proving fairness of termination to shifted to the respondent. In other words, after proof of date of termination by the applicant, then, respondent was under duty to prove fairness of 9 termination of the said employment as provided for ection 39 of the Employment and Labour Relations Act [Cap. 366 R.E. 2019]. The said section does not provide that an employer has a duty to prove each allegation raised in employment dispute with the employee. The duty of proof under the said section is only limited to fairness of termination. It is my view that, in the circumstances of this application, section 39 of Cap. 366 R.E. 2019 (supra) is inapplicable because applicant did not prove that his employment

was terminated on 01st April 2021. For all stated hereinabove, I find that this application is unmerited and dismiss it. Dated at Dar es salaam this 13th February 2024 B. E. K. Mganga JUDGE Judgment delivered on 13th February 2024 in chambers in the presence of Steven Chambo Kivuma, the Applicant and Edward Simkoko, the Personal Representative of the Applicant on one hand and Daniel Bushele John, Advocate for the Respondent. B. E. K. Mganga JUDGE 10

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