IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT SHINYANGA

LABOUR REVISION NO. 17 OF 2020

(Arising from the Labour dispute Decision No. CMA/SHY/176/2013 by the Commission for Mediation & Arbitration of Shinyanga dated 6/6/2015)

WILLIAM A. SALEH..... .....APPLICANT

VERSUS

TANZANIA ELECTRIC SUPPLY COMPANY LTD..... ...RESPONDENT

JUDGMENT

19th April & 4th June, 2021

MKWIZU,J.:

Applicant was employed as an Auto Diesel technician by the respondent since 1/9/1995 until 17/9/2013 when his employment was terminated by the respondent. The facts which led to the said termination are that on 5th March 2013 at 22.30hrs while acting as a District Manager, TANESCO Bariadi District and he was informed that his subordinates have been arrested with a company vehicle carrying stollen cement at Nyakabindi are in a Camp site owned by Chinese Company dealing with road contractions. He reported the incident to the District manager who was at that time on a study leave and the Reginal procurement offer before the matter was reported to the Reginal Manager. After investigation applicant was charged with two counts.

Hearing was held culminating into termination of the applicant's employments on the ground of a gross misconduct.

Unhappy with the termination, on 4/10/2013 applicant filed a labour dispute at the CMA, claiming to be unfairly terminated. His claim was dismissed by the CMA for lacking in merit. The arbitrator concluded that, the termination was both substantively and procedurally fair. Aggrieved by the said decision applicant moved this Court to call for the records of the Commission for Mediation and Arbitration and revise the proceedings, award and orders therein.

The application was through a notice of application made under Sections 91(1) (a)(b) 91 (2) (b) of the Employment and Labour Relations Act No. 6 of 2004 read together with Rules 24(1), 24(2) (a), (b), (c), (d), (e), (f) and 24 (3) (a), (b), (c), (d) and 28 (1) (a), (b) (c), (d) and (e) of the Labour Court Rules, G. N. No. 106 of 2007 and supported by applicant's own affidavit in which five (5) legal issues are itemized for this court's determination, namely:

> *4.1. That the arbitrator erred in law and facts, by her failure to note that the Respondent had no fair reason upon which to terminate the Applicant*

4.2. That the arbitrator erred in law and facts, by her failure to identify some procedural irregularities committed by the Respondent's disciplinary authority prior to the termination of the Applicant.

4.3. That the arbitrator erred in law and facts, by her findings that termination was an appropriate sanction to the Applicant.

4.4. That the arbitrator erred in law and facts, by supporting the termination of employment contrary to the findings of the disciplinary committee.

4.5. That the arbitrator erred in law and facts, by not taking into consideration that the Applicant communicated the disappearance of the Respondent's motor vehicle to the Acting Regional Manager.

The application is opposed. Respondent filed a notice of opposition, a notice of representation as per Section 56 (c) of the Labour Institution Act No. 7 of 2004 and Rule 43 (1), (b) of the Labour Court Rules, G. N. No. 106 of 2007 and a counter affidavit sworn by Norbert Bedder respondent's advocate.

When the matter came for hearing, Mr. Said Selemani learned advocate appeared for the applicant and Ms. Theresia Masanja also learned advocate appeared for the respondent.

Before submitting for the application, Mr. Selemani Said advocate abandoned grounds number 4.3. 4.4 and 4.5 and prayed to argued grounds number 4.1 and 4.2 only. Starting with the 1st issue that is issue 4.1, Mr. Selemani faulted the arbitrator for her failure to note that respondent had no fair reason upon which to terminate the applicant's employment. On this issue, Mr. Selemani had two points, lack of clarity on the reasons for termination and secondly that termination was not the only remedy.

Making reference to Rule 12 (1) (b) (ii) of GN No. 42 of 2007, and item 10,11, and 12 of the Hearing Form, Mr. Selemani said, the reasons for termination were ambiguous and unclear. item 10 of the Hearing Form - Exhibit D7 indicated the bases of the findings of the Disciplinary Committee, item 11 indicated the relevant facts used in arriving at an appropriate penalty while the item 12 indicated the outcomes of the hearing. Reading them together, argued Mr. Selemani, you find no clarity on what exactly was the reason for termination of the applicant's employment.

Mr. Selemani argued further that, page 10 paragraph 2 of the award, arbitrator said the reason for the applicant's termination was failure to comply with TANESCO guidelines and procedure and later in the same page

the arbitrator said, the applicant failed to report on time the disappearance of the office motor vehicle. He contended that, the bases for the Disciplinary Committees findings were not clear and so the reason for the termination.

In addition to that, stated Mr. Selemani, the Disciplinary committee arrived into its finding without calling important witnesses namely Limbu who was a driver of the vehicle in question and one Magreth Msingi, cashier a person who issued the money for the purchase of the alleged stollen cement bags. While acknowledging that during the said hearing the mentioned witnesses whereabout was unknown, he insisted that they were important witness.

On whether termination was an appropriate penalty under the circumstances of this case, Mr. Selemani cited the provisions of Rule 12 (1) (b) (v) of GN No 42 of 2007 arguing that, verbal warning or rather demotion would do justice in this case. He said, the applicant was a first offender and the offence was only failure to report the disappearance of the office vehicle on time to the Reginal Manager. Citing rule 12 (2) (4) of GN No. 42 of 2007, he insisted that, termination to the first offender would only be justified if the misconduct is a serious one. Applicant was a person with a clear employment records and had served his employer for a period of 23 years and therefore

termination of his employment for not reporting the incident on time was a severe punishment, he argued.

On the second issue, Mr. Selemani challenged the arbitrator's award for not taking into account that the hearing committee committed some procedural irregularities. He said, according to Rule 13 (7) of GN No. 42 of 2007, the Disciplinary Committee was required to give the applicant an opportunity to put forward mitigating facts. The Disciplinary Committee in this matter did not comply with this procedural requirement. He cited the case of National **Microfinance Bank V Victor Modest Banda**, Civil Appeal No 29 of 2018 on this point and prayed for the court to allow the revision.

In response to the applicant's counsel's submission, Ms Theresia was brief but focused. On the issue that the reasons for termination were ambiguous and unclear, Ms. Theresia made reference to paragraph 3 of the Disciplinary hearing Form (Annexture A4) saying that it narrated the offence committed as Kushindwa kusimamia mali ya shirika and item 11 indicating facts to be considered in arriving into an appropriate sanctions and that applicant at the end was terminated for failure to protect company's properties.

She said, page 4 para 2 of the award shows how the applicant failed to act promptly on the incident. The vehicle was found with stollen items. According to the applicant, he got information at 22. 30 hrs but it is not known as to what he did at that night until the next day and it is on the records that between 18.00 hrs to 22.00 hrs. on the material date applicant had switched off his phone and no explanation were given as to why his phone was off. She was of the view that, the evidence and the records read together gives with clarity the reasons for the applicant's employment termination.

Ms. Theresia, opposed the submission by the applicant's counsel that applicant is a person of a clear records and that applicant was not given time to mitigate for being raised for the first time here. She argued that arbitrator had confirmed that rules 13 (1-10) of GN no 42 were followed and finally prayed for the dismissal of the revision.

The rejoinder submissions were essentially the reiteration of the submissions in chief.

I have sensibly examined the issues brought for determination in the affidavit in support of the application. The 1st issue (4.1) is challenging the substantive part of the termination while the second issue, under per para 4.2 challenges

the procedural aspects of the said termination. That being the case, I find following issues relevant for proper determination of the matter at hand:

(i) Whether the respondent had valid and fair reasons for terminating the applicant's employment.

(ii) Whether the reasons for termination were clear and unambiguous.

(iii) Whether the procedure were properly followed.

(iv) What reliefs parties are entitled to?

On fairness of the reason for termination of the applicant's employment, section 37 (2) (a) (b) of the Employment and Labour Relations Act, 2004, is of guidance. The section provides categorically that, termination of employment is unfair if the employer fails to prove that the reason for termination is valid and fair. The sections reads:

> *"37 (2) A termination of employment by an employer is unfair if the employer fails to prove-*
>
> *(a) That the reasons for termination is valid;*
>
> *(b) That the reason is a fair reason-*
>
> *(i) Related to the employee's conduct, capacity or compatibility; or*
>
> *(ii) Based on the operational requirements of the employer.*
>
> *(c) that the employment was terminated in accordance with a fair procedure."*

Therefore, for termination of ones employment to be fair, it should base on a valid reason and fair procedure. In other words there must be a substantive and procedural fairness in termination of employment. See the case of **Tanzania Railway Limited Vs. Mwajuma Said Semkiwa**, Revision No. 239 of 2014, High Court Labour Division at Dar Es Salaam (Unreported). The duty to prove the fairness of termination is on the employer and not the employee. This is the imports of section 39 of the Employment and Labour Relations Act.

Though not categorically stated, the findings of the disciplinary committee and the arbitrators award, read together provides that applicant's employment was terminated for gross misconduct namely failure to report the disappearance of the company vehicle which had involved into a theft incident to the proper authority. The respondent's evidence proved that, applicant failed to discharge his duty to the standards required by his position as Acting District Manager contrary to the instruction given to him via exhibit D1 and TANESCO code of conduct and Ethics Exhibit D6.

In his testimony, respondent's witness supported by the contents of exhibit D1 explained that, one of the instructions given to the applicant as an Acting

District manager was to report any controversial issue to the Reginal Manager for advice and solution. It is from the records that this instruction was not implemented. In his own evidence, applicant said he first reported the matter to the District Manager who was on a study leave and to the Reginal Procurement Officer. Apart from exhibit D1, applicant as an employee of the respondent also signed exhibit D6 the TANESCO code of conduct and Ethics in which the protection of the company properties and ethic issues are emphasized.

His complaint at the CMA was that, there is no evidence that he authorized the taking of the company vehicle for purposes of committing the crime. The arbitrator found that the committed misconduct went contrary to the instruction given to him through exhibit D1 and D6.

In arriving at its decision, at page 9, the arbitrator took into account the evidence adduced on how the office was handled to the applicant, the instruction given to him through Exhibit D1, the incidents report (Exhibit D8) and TANESCO's code of conduct and ethics (exhibit D6). In page 10 of the award, the arbitrator had this to say:

"Pia hata utoaji wa taarifa kuhusu utowekaji wa gari kwa meneja TANESCO mkoa ulichukua muda mrefu sana taarifa aliwapa watu wengine na sio meneja wa mkoa na malalamikaji alikwenda kinyume kabisa na maelekezo aliyopewa na meneja wakati anakabidhiwa ofisi aya ya mwisho ya kielelezo D1 kwamba nanukuu" to any controversial issue should be referred to Reginal manager for advise and solution". Kitendo cha kutoweka gari hakikuwa cha kawaida hivyo mlalamikaji hakuwa na budi kutoa taarifa kwa meneja wa mkoa mapema iwezekanavyo kama alivyokuwa ameelekezwa awali. Kwa hali hiyo basi mlalamikiwa alikuwa na sababu za msingi za kumuachisha kazi mlalamikaji"

Given the analysis above, it is without doubt that applicant had infringed the rules of procedure by his employer for failure to take prompt actions in reporting theft incident involving his employer's vehicle to the proper authority.

Now, what should have been an appropriate sanction under the given circumstances. Having found applicant guilty, the next step by the employer was to find whether termination is an appropriate sanction. This is the legal requirement under Rule 12 of GN No 42 of 2007. Subrule 2,3 and 4 provide.

"Rule 12
(2) ***First offence of an employee shall not justify termination unless it is proved that the misconduct is so***

serious that it makes a continued employment relationship intolerable.

(3) The acts which may justify termination are-

(a) gross dishonesty;
(b) wilful damage to property;
(c) wilful endangering the safety of others;
(d) gross negligence;
(e) assault on a co-employee, supplier, customer or a member of the family of, and any person associated with, the employer;
and
(f) gross insubordination.

(4) In determining whether or not termination is the appropriate sanction, the employer should consider –

(a) the seriousness of the misconduct in the light of the nature of the job and the circumstances in which it occurred, health and safety, and the likelihood of repetition; or

(b) the circumstances of the employee such as the employee's employment record, length of service, previous disciplinary record and personal circumstances."

The 1st offence by an employer does not justify termination as expressly provided for under sub rule 2 above. And for termination to be imposed as a penalty, the seriousness of the misconduct, nature of the assignment and the general circumstances of the assignment must be taken into account including employees employment records, length of service, previous disciplinary records and personal circumstances.

The evidence brought before the CMA as well as the Disciplinary hearing unveils nothing strange in connection to the applicant's employment records. It is , as rightly said by the applicants counsel, safe to conclude that applicants is a person with a clean employment records. He has been working with the respondent for 23 years since 1995. And apart from the evidence that he delayed in reporting the incident involving disappearance of the company's vehicle for 24 hours, there is no evidence that he personally participated anyhow in the alleged incident. The above facts ought to have been taken into account by the employer or the arbitrator in arriving at a conclusion on whether the termination was fair or not. The arbitrator did not take this point into account leading to a wrong conclusion.

Section 39 of the Employment and Labour Relations Act requires the employer to prove the fairness of the termination contrary to that the termination is regarded as unfair. Section 39 of the ELRA reads:

> *"In any proceedings concerning unfair termination of an employee by an employer, the employer shall prove that the termination is fair "*

In **National Microfinance Bank V Leila Mringo and 2 Others**, Civil appeal No 30 of 2018, (Unreported), Court of appeal siting at Tanga had this to say regarding interpretation of section 39 above:

> *"We agree with the respondents' counsel that section 39 reproduced above, has the effect of shifting the burden of proof of fair termination to the employer in any proceedings concerning unfair termination. In such cases, the employee's duty is simply to allege termination and that it was unfair."*

The records do not tell how the employer and the arbitrator considered the provisions of rule 12 above before arriving into a conclusion that the termination of the applicant's employment was fair. Having evaluated the facts and the said rule 12, I am satisfied that, failure to report the incidents to the proper authority and having regards to the general circumstances of the facts leading to the complained termination, it is obvious that the misconduct committed do not qualify the acts stipulated under rule 12 (3) of GN No 42 of 2007. The reason for the termination was unfair and therefore termination of the respondents was, certainly, not justified. See **Elia Kasalile & 20 others v. The Institute of Social Work**, Civil Appeal No. 145 of 2016 (Unreported)

Another complaint was on the fairness of the procedure. Fair procedures in relation to the termination proceedings are outlined under the provisions of Rule 13 (1-10) of the Employment and labour relations (Code of good practice) Rules, 2007. Arbitrator found that the procedure for termination were adhered to.

The procedural issues brought for determination here are mainly two, lack of clarity on the reasons for termination and denial by the disciplinary Committee to afford the applicant an opportunity to put forward their mitigating factors after he was found guilty contrary to the law.

To have a clear understanding of what transpired, I propose to start with the charge sheet. Exhibit D3 is the charge sheet two offences that:

> ***"CHARGE NO 1. -STATEMENT OF THE CHARGE***
>
> *...Serious misconduct resulting in authorizing Company vehicle SU 38104 TOYOTA DYNA to go to Nyakabindi Village about 45kms away from Bariadi town out of working hours (about 18.00pm) to do un authorized and personal activities without any consent of higher authority.*
>
> *This ....is an offence in accordance with rule 12(1) (a) and (b) and Rule 12 (3) (d) of the Employment and Labour Relations (Code of good Practice) Rules, 2007, Section "u" and "v" of the*

TANESCO Disciplinary Code, an offence with section 5.4.4 of TANESCO transport Policy Guidelines and also an offence in accordance with section "2.3"."2.6" and "2.7" of TANESCO code of conduct and Ethics....

CHARGE NO 2. -STATEMENT OF THE CHARGE

Gross misconduct resulting into intention of prohibiting of the act of the use of Company vehicle SU 38104 TOYOTA DYNA on 5th March, 2013.
...in your capacity as District Accountant, Bariadi you influenced the intention of prohibiting the act of not reporting the movement of the Company vehicle SU 38104 TOYOTA DYNA as from 5th March 2013 to 6th March 2013. This is an act of gross dishonest, misappropriation of Company property and revenue loss to the company..."

Applicant's complaint at the CMA was that, there is no evidence that he authorized the taking of the company vehicle for purposes of committing the crime. He doubted the disciplinary committee decision for having no bases from its own proceedings and for lacking important information from one Limbu and Magreth Msingi who he identified as important witnesses.

I have revisited the evidence on the records plus the Disciplinary committee proceeding (Exhibit D7). It is clear that, Limbu's where about was unknown. On what led to the Disciplinary committees' findings, para 10,11 and 12 of

the proceedings of the said committee read together are to the effect that though the main actor, Mr. Limbu was not available before the committee, the evidence showed serious weaknesses on reporting the incident to a proper authority. Item 12 of Exhibit D7- the hearing Form reads:

> *"Pamoja na kutokukamilika kwa Ushahidi ili kujua ni nani hasa aliruhusu gari kutoka nje ya kituo, ni* ***Dhahiri kwamba kumekuwepo na udhaifu mkubwa katika kutoa taarifa kwenye ngazi husika hivyo mfanyakazi ana kosa"*** *(emphasis added)*

The bold party of the Disciplinary Committee above shows that that the applicant was found guilty of the offence.

The hearing Form (exhibits D7) is however silent on three issues. **One**, whether applicant was found guilty on both offences he was charged with or on only one offence. ***Secondly***, whether applicant was given an opportunity to put forward his mitigation after he was found guilty of the offence(s) and ***thirdly***, whether the decision as well as the reasons for termination were communicated to the applicant.

Rule 13 (7), (8) and (10) are of relevant here. The rules provides

> *"(7) Where the hearing results in the employee being found guilty of the allegations under consideration,* ***the employee shall be given the opportunity to put forward any***

mitigating factors before a decision is made on the sanction to be imposed.

(8) After the hearing, the ***employer shall communicate the decision taken,*** *and preferably furnish the employee with written notification of the decision,* ***together with brief reasons****.*

(10) ***Where employment is terminated, the employee shall be given the reason for termination*** *and reminded of any rights to refer a dispute concerning the fairness of the termination under a collective agreement or to the Commission for Mediation and Arbitration under the Act." (Emphasis added)*

According to exhibit D7, the Disciplinary hearing was held on 19/6/2013 and the outcome of the hearing was delivered on 20/6/2013 followed by a termination letter dated 17th September, 2013.There is no single evidence indicating that applicant was given an opportunity to put forward his mitigation. This was contrary to rule 13 (7) of GN No 42 of 2007 which requires the employer to give right of mitigation to the employee after the employee is found guilty of the misconduct charged.

Again, the records under scrutiny are silent on whether the applicant was furnished with a written notification of the decision and the reasons for the decision therein.

Worse enough, even the termination letter contains no reasons for termination. Reading the termination letter served on the applicant dated 17th September, 2013 – exhibit D9 no reasons for termination of his employment was stated apart from notifying him that Management is in agreement with the decision of the Chairperson of the Disciplinary committee. The letter does not say what was the reason for the termination.

With the above shortfalls, it is obvious that, respondent- employer failed to discharge her duty of proving that the applicant's termination was fair both substantially and procedurally. That said, I find the arbitrator's finding that the termination procedures were adhered to without merit.

Last issue for determination is on the reliefs parties are entitled to. In his affidavit in support of the revision, applicant prayed for reinstatement and payment of his monthly salaries from the date of termination to date and an order that he be issued with a certificate of service. The remedies for unfair

termination are provided for under section 40 (1) of the Employment and Labour Relations Act. I will quote for clarity:

> *"If an arbitrator or Labour Court finds a termination is unfair, the arbitrator or Court may order the employer-*
> *(a) To reinstate the employee from the date the employee was terminated without loss of remuneration during the period that the employee was absent from work due to the unfair termination; or*
> *(b) To re-engage the employee on any terms that the arbitrator or Court may decide; or*
> *(c) To pay compensation to the employee of not less than twelve months' remuneration."*

On what should be a proper remedy, in **Noel F. Mbanguka V Institute of Accountancy Arusha**, Consolidated revision No 53 and 48 /2015 (Unreported) this court said:

> *"Generally, where termination is adjudged unfair on procedural grounds only, and depending on the extent of the flouted procedure, a decision maker will award compensation instead of reinstatement or re engagement under section 40 (1) (a0 and (b) respectively. But, where termination is adjudged both substantively and procedurally unfair, reinstatement would be the appropriate remedy, unless there are justifiable grounds such*

as those enumerated under rule 32 (2) (a) to (d) of GN 67 of 2007"

As I have already found that the termination was substantively and procedurally unfair, the applicant is entitled to re instatement as prayed for under section 40 (1) (a) of the ELRA. Consequently, revision is allowed and the arbitrator's award is quashed and set aside. This being a labour matter, I make no order as to costs.

DATED at **SHINYANGA** this 4th day of **June, 2020**

E. Y.MKWIZU
JUDGE
4/6/2021

COURT: Right of appeal explained.

E. Y.MKWIZU
JUDGE
4/6/2021