

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[ARUSHA SUB-REGISTRY]

AT ARUSHA

APPLICATION FOR LABOUR REVISION No. 43 of 2023

(C/f Labour Dispute No. CMA/ARS/70/23/30/23)

DANIEL ASSERY PALLANGYO APPLICANT

VERSUS

RED EARTH LIMITED RESPONDENT

JUDGMENT

18th January & 15th March, 2024

TIGANGA, J.

In this application, the applicant seeks revision of the Award from the Commission for Mediation and Arbitration of Arusha (CMA) in Labour Dispute No. CMA/ARS/70/23/30/23 dated 26th June 2023 before Hon. Lomayani Stephano, Arbitrator.

The application has been brought by Chamber summons, the Notice of application as well as the Notice of representation appointing Mr. Keneth Samwel Ochina, to represent the applicant. It moved the court under sections 91 (1) (a) (b) and 91 (2) (a) (b) (c) and 94 (1) (b) (i) of the **Employment and Labour Relations Act**, No. 6 of 2004 (the ELRA) and Rule 24 (1), (2) (a) (b) (c) (d) (f), (3) (a) (b) (c) (d) and 28 (1) (a) (c) (d)

(e), of the **Labour Court Rules, GN. 106 of 2007** (Labour Court Rules).

The application was supported by the affidavit duly sworn by the applicant in which under paragraph (j) the grounds for the application are narrated as follows;

- i. That, the Commission erred in law and fact in failing to consider that, there were material irregularities with the whole process of ending the applicant's employment contract, hence acted contrary.
- ii. That, the Commission erred in law and fact in failing to consider that, the alleged allegation was a police case hence the respondent acted contrary in assuming the police responsibility.
- iii. That, the Commission erred in law and fact in holding that the whole process was fully adhered to in the ending of the applicant's employment.
- iv. That, the trial arbitrator erred in law and fact in failing to give out Award in time as required by the law and further failed to give reasons for such delay.
- v. That, the Commission erred in law and fact in failing to consider that, the respondent representative did not file notice of representation as required by the law.

The brief background that led to this dispute is that the applicant was employed by the respondent on 19th March 2010 (by then known as A-to-Z Textile Mills Limited) as a Maintenance Team Leader on a one-year fixed term contract renewable each year. The last contract started on 1st November 2022 and was terminated on 19th January 2023 following a theft allegation against the applicant.

According to the evidence on record, the applicant claimed that he was terminated after there was an allegation that he stole 30 liters of Kerosine oil while assisted by one Juma Elias, his fellow employee. The evidence further tends to prove that the two, sold it on 21st December 2022 and shared the proceeds. Following such an allegation, an investigation was conducted followed by a disciplinary meeting where the respondent was of the view that the allegation of theft was proven and hence consequent of which he was terminated from his employment.

Disgruntled, he challenged the decision and took the matter to the Commission in pursuit of his rights claiming that he was unfairly terminated.

After hearing the evidence from both parties, the Commission decided in favour of the respondent that, the applicant's termination was fair since his conduct warranted the termination of his employment.

Aggrieved by the Award, the applicant preferred the current application which was heard by way of written submissions. The applicant was represented by Mr. Kenneth Ochina, learned Advocate whereas the respondent was represented by Mr. Ebenezer Bwayo, legal representative.

Supporting the application, Mr. Ochina submitted that, when called at the disciplinary hearing, the applicant was informed by his fellow employee that, the management was no longer interested in him. Following that state of affairs, in the said meeting, the applicant was never heard, rather, he was just told to sign the disciplinary forms, exhibit P4 which he did. In that regard, he was terminated without being availed a right to be heard, a fact which was never disputed by the respondent during the hearing. He cited sections 61 and 62 (1) (a) of the **Evidence Act**, [Cap 6, R.E. 2022] and further submitted that the said exhibit P4 does not reflect any witnesses or the respondent's claims before the disciplinary hearing that represent the complaint or charge by the management contrary to rule 4 (6) of the **Employment and Labour Relations (Code of Good Practice) GN. No**

42 of 2004 (the Code). In the circumstances, the Commission erred in failing to note the above irregularities, he said.

The learned counsel went on to submit that, the Commission also failed to consider the fact that, the respondent's premises have CCTV Cameras and security guards, but none of them were used as proof regarding theft allegations made against the applicant. That, according to rule 13 (5) of the Code of Good Practice, all evidence about theft allegations was supposed to be tendered during disciplinary hearings. More so, the chairman of the disciplinary committee was one Innocent Manyasa, whose position is lower than that of the applicant as the former used to report to the latter in their department. Therefore, as a matter of law and practice, he was not supposed to chair the disciplinary hearing, there was no way he would have been fair to him.

According to him, apart from the human resource officer, all other members of the disciplinary committee were his subordinates leading to insubordination, lack of fairness, and impartiality.

The learned counsel further submitted that exhibit P4 shows that it was issued on October 2022 and although the applicant was terminated on

January 2023, there were elements of evil acts planned by the respondent prior to his termination. He cited sections 37 (1) and (2) (a) of the ELRA and sections 110, 111, and 112, as well as 113 of the Evidence Act, (supra), and added that the respondent did not provide sufficient reason to terminate applicant's employment during the disciplinary hearing as well as during trial at the Commission. He also referred the Court to the cases of **Leonard Ndege vs. Tanzania Telecommunications (TTCL)**, Revision No. 32 of 2014, and that of **Tanzania Railways Limited vs. Mwijuma Said**, Revision No. 239 of 2014 whereby in both cases it was emphasized that termination of employment should base on valid reasons.

It was further submitted that the Commission delayed delivery of the Award and no reason was availed following such delay. The matter was last heard on 29th March, 2023 but the Award was delivered on 26th June, 2023. He prayed that this application be granted and the respondent be ordered to pay the applicant a total of Tsh. 8,775,000/= being 12 months compensation for unfair termination, severance pay, Notice, and subsistence allowance.

In reply, Mr. Rwabyo who appeared in representation of the respondent submitted that the applicant was fairly heard during the

disciplinary committee hearing as he appeared on 13th January, 2023 after being summoned on 10th January, 2023. That, the applicant signed exhibit P4 after the hearing and not before as he alleged in the submission. He pleaded with this Court not to consider that allegation because they contained no truth. This is because the applicant said he was told by one Innocent Manyasi, his fellow staff that, the employer no longer needed him. Since such a statement is a hearsay and not backed up with any proof it has no evidential value. To cement this point, he cited the case of **Leopold Mutembei vs. Principle Assistant Registrar of Titles, Ministry of Land, Housing and Urban Development & Another**, Civil Appeal No. 57 of 2017 in which the Court of Appeal of Tanzania emphasized that, unconfirmed information cannot be acted upon by the court of law.

It was further submitted that the respondent adhered to rule 4 (6) of the Code of Good Practice, contrary to what was submitted by the applicant in his submission. He said one Juma Alex who was summoned as a witness was the applicant's accomplice in the alleged theft incident. Also, the applicant made his defence which is all reflected in exhibit P4, and that, not all of their premises are covered with CCTV. Regarding insubordination and the fact that the disciplinary committee was full of the applicant's junior staff,

Mr. Rwabyo submitted that according to rules 13 (1) and 4 of the Code, a chairperson of the Committee was not to be involved in the circumstances giving rise to the case. Hence, the chairman being junior to the applicant does not mean insubordination since he was impartial enough to chair the meeting.

Mr. Rwabyo further submitted that part 8 of exhibit P4 clearly shows that, the applicant never disputed being involved in the misconduct hence his termination was reasonable pursuant to section 37 (1) & (2) (a) of the ELRA. He also contended that the fact that, the applicant's termination was pre-meditated on the ground that, exhibit P4 shows October 2022 dates. He argued that almost all forms are formulated to be used for disciplinary hearings but what matters is the day the details of the hearing were filled.

He further averred that, during the trial at the Commission, the respondent tendered exhibit P1 to P7 to prove the case against the applicant herein in which the Commission was satisfied, hence made a decision in their favour and that was done in adherence to the requirement of sections, 110 to 113 of the Evidence Act.

On the delay of the Award, Mr. Rwabyo submitted that the Commission has discretion in managing the time to deliver its Award. Nevertheless, he argued, the applicant has not shown how such delay occasioned him injustice. Lastly, he argued that despite his termination being fair, the applicant was entitled to some benefit tuning Tshs. 306,500/= which he had already been paid, hence, he does not owe the respondent any kind of compensation. He prayed that this application be dismissed in its entirety.

In his brief rejoinder, the applicant reiterated his submission in chief and maintained his stance that, he was unfairly terminated.

After considering both parties' affidavits, and submissions and after a thorough perusal of the records and decision of the CMA, I now proceed to determine the grounds of revision. However, since both parties submitted on all grounds generally, I will be guided by the following issues;

1. Whether the reasons for termination were fair,
2. Whether the procedures for termination were followed, and;
3. Whether the reliefs Awarded were reasonable.

Starting with the 1st issue of whether the reason for termination was fair. According to the respondent, it was the applicant's misconduct that led

to his termination. The misconduct alleged misconduct is that the applicant together with his colleague Juma Alex stole 30 liters of kerosene, sold the same, and divided the proceeds among themselves. According to exhibit P4, the Disciplinary hearing form, the said Juma Alex testified and confessed to having executed the deed by the applicant sending his subordinates Elibariki and Jackson to take crude and clean kerosine to Juma Alex to sell the same and without authorization. In his defence, the applicant claimed that he only authorized and gave the said Elibariki and Jackson crude oil and not a clean one. However, the said Elibariki and Jackson also testified that they took both clean and crude kerosine from the applicant to Juma Alex in executing their daily duties.

The law is clear that, whenever there are elements of crime in civil cases, the same must be proved although not on the same standard as that of the criminal cases. This was emphasized in the case of **Twazihirwa Abhaham Mgema vs. James Christian Basil (As Administrator of the Estate of the Late Christian Basil Kiria, Deceased)**, Civil Appeal No. 229 of 2018, CAT at Dsm, the Court of Appeal referred to its earlier decision in the case of **Omari Yusuph v. Rahma Ahmed Abdulkadir** [1987] T.L.R 169, where it was held *inter alia* that;

"When the question whether someone has committed a crime is raised in civil proceedings, that allegation needs to be established on a higher degree of probability than that which is required in ordinary civil cases."

Guided by the cited authority, it is my considered opinion that, the evidence brought before the disciplinary committee justified termination of the applicant. As a result, I find no need to disturb the Commission's decision on that aspect that, the termination was based on fair reasons.

The second issue is regarding the procedure used to terminate the applicant. The aspect of fair procedure for termination is guided under Rule 13 of the Code. Starting with Rule 13 (1), requires an investigation to be done whereas Rule 13 (2) requires employees to be notified of the allegations in advance before the disciplinary hearing, the notice must be within a reasonable time. The reasonable time prescribed is at least 48 hours as per Rule 13(3) of the Code. Rule 13(4) requires the disciplinary committee meeting to be chaired by a sufficiently senior management representative not involved in the circumstances giving rise to the case while rule 13(5) requires the employee, during the hearing, to be allowed to respond to the allegations. Further, rule 13(8) requires the decision taken to be properly

communicated to the employee and the outcome to be indicated in the hearing form as filled by the chairperson of the disciplinary committee that conducted the hearing.

Looking at the evidence on record, the inquiry was done and as per the applicant's testimony, he was suspended from 23rd December 2022 to 10th January 2023 to pave the way for investigation. That was followed by a letter written to him as seen in exhibit P5 informing him to prepare his defence. All these were done before the disciplinary hearing which was scheduled on 13TH January 2023, and the applicant was duly notified on 10th January 2023, and seen in exhibit P3. A disciplinary hearing was done and the outcome is seen in exhibit P4 where it was decided that his contract should be terminated. He appealed against such a decision as seen in exhibit P5, and the same failed in exhibit P6 he was issued his termination letter.

Since rule 13 and its sub-rules are couched in mandatory terms, I am of the profound view that the respondent adhered to all the procedures before ending the applicant's contract. In that regard, I find that the applicant's termination was fair substantively, and procedurally.

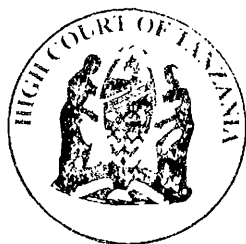
As to the third issue on the reliefs, I also uphold the Commission's decision that the applicant failed to prove his claims, hence he was not entitled to the claims he prayed in CMA F.1.


On the fact that the Award was delivered two months after the last hearing date, I find this argument weak. I hold so because even though the learned Arbitrator failed to deliver the Award on time, the applicant did not submit how such delay prejudiced him. Thus, in the spirit of overriding objective, this anomaly can be pardoned.

In light of the above, I find the revision has no merit to the extent explained hereinabove. Consequently, this application is dismissed and the CMA's Award is hereby upheld. This being a Labour Dispute, I give no order as to costs.

It is accordingly ordered.

DATED and delivered at **ARUSHA** this 15th day of March 2024




J.C. TIGANGA
JUDGE