IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 114 OF 2023

(Arising from an Award issued on 30/09/2022 by Hon. Chacha L.C, Arbitrator in Labour dispute No. CMA/DSM/KIN/268/172/21 at Dar es Salaam)

DEODATUS TABU TARIMO..... APPLICANT

VERSUS

TANZANIA MATCH INDUSTRIES LTD..... RESPONDENT

JUDGMENT

Date of last order: 10/07/2023
Date of Judgment: 11/08/2023

B.E.K. Mganga, J.

Facts of this application are that, on 25th July 2017, respondent employed the applicant as a machine helper for unspecified period contract of employment. The parties enjoyed their employment relationship up to 18th March 2020, when respondent served applicant with a letter showing that she has terminated applicant due to absenteeism.

Applicant was aggrieved with termination of his employment, as a result, he filed Labour dispute No. CMA/KIN/268/172/21 before the Commission for Mediation and Arbitration henceforth CMA at Kinondoni. In the Referral form (CMA F1), applicant indicated that the dispute arose on 26th March 2020 and that, he was claiming to be paid TZS 34,560,000/= being 16 years salaries compensation for unfair termination. On fairness of reasons, applicant indicated that the reason for termination was unfounded. On fairness of procedure, he indicated that procedural rules were not followed.

On 30th September, 2022, Hon. Chacha L. C, Arbitrator, having heard evidence and submissions of the parties, issued an award that termination was substantively and procedurally fair. The arbitrator, therefore dismissed the dispute.

Applicant was aggrieved with the said award, as a result, he filed Revision Application No. 397 of 2022 which was struck out for being incompetent (Hon. Mteule, J). Thereafter, he filed this revision application. In the affidavit in support of the Notice of Application, applicant raised three (3) grounds namely: -

a) *Whether the Complainant was given a right to be heard by the respondent;*

b) *Whether the notice to attend a disciplinary meeting/hearing was explanatory and elaborative enough to enable the complainant to understand the charge against him;*

c) *Whether the Complainant was duly served with notice to attend a disciplinary meeting and a charge before the said meeting was conducted.*

In opposing the application, respondent filed Notice of opposition and counter affidavit affirmed by Hassan Dewji, her Principal officer.

By consent of the parties, the application was disposed by way of written submissions. In compliance with the court order, applicant drew and filed his submissions in person while respondent enjoyed the service of Mr. Mwambene Adam, Advocate.

In his written submissions, applicant submitted that, arbitrator issued an award in favour of the respondent without considering that applicant was deprived right to be heard by the disciplinary committee because, he was not given chance to be heard hence violation of his constitutional right. He cited the case of ***Tanzania Telecommunication Company Limited v. Augustine Kibanda,*** Labour Revision No. 122 of 2009, HC (unreported) to support his submissions. In cementing on his submissions that he was denied right to be heard, applicant submitted that he was neither served with the charge nor notice to appear before the disciplinary hearing committee. He added that there was no proof of

service. To implore the court to hold that termination was unfair because he was denied right to be heard, applicant further cited the case of ***Severo Mutegeki and Rehema Mwasadube v. Mamlaka ya Maji Safi na Mazingira Mjini Dodoma***, Civil Appeal No. 343 of 2019, CAT(Unreported).

Applicant submitted further that; a letter dated 4th March 2020(exhibit D4) was not self-explanatory enough to enable him to prepare for his defence in the said disciplinary hearing. He submitted further that, the charge in the said exhibit D4 reads "kukiuka taratibu za kazi" which is different from what is contained in exhibit D1 that reads "utoro kazini". Applicant submitted further that, respondent did not comply with Rule 13 of the Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007. He cited the case of ***Mbeya Rukwa Auto parts and Transport Limited v. Jestina George Mwakyoma,*** Civil Appeal No. 45 of 2000 and ***Benedict Kimwaga v. Principal Secretary Ministry of Health,*** Civil Appeal No. 75 of 2008 both unreported and ***Selcom Gaming Limited v. Gaming Management (T) Ltd and Gaming Board of Tanzania*** [2006] TLR 200(CAT) to support his submissions that, the employer must comply with the provisions of Rule 13 of GN. No. 42 of 2007(supra) and that, the employer had a duty to inform the employee of his rights under the

said GN. Based on the foregoing submissions, applicant prayed that the application be allowed.

Resisting the application, Mr. Mwambene, learned counsel for the respondent submitted that, Suleiman H. Venance from TUICO, a trade Union, witnessed applicant refusing to be served with invitation to attend the disciplinary hearing dated 11th February 2020 (exhibit D1) as a result, disciplinary hearing was conducted on 13th February 2020 in absence of the applicant. To support that submission, counsel referred to the disciplinary hearing minutes (exhibit D2). Counsel submitted further that, based on the said ex-parte hearing, on 18th February 2020, the disciplinary hearing committee issued a written warning (exhibit D3), but applicant refused to sign or to be served. Counsel for the respondent went on that, respondent issued another notice dated 4th March 2020 (exhibit D4) for the applicant to attend disciplinary hearing, but applicant, in presence of Peniel Ignatio Koloina and Suleiman H. Venance, representatives from TASIWU and TUICO trade Union respectively, refused to sign. Counsel for the respondent submitted that, minutes of the disciplinary hearing dated 6th March 2020 (exhibit D5) shows that applicant said that he cannot attend the said hearing, as a result, applicant was terminated as per termination letter dated 18th March 2020(exhibit D5).

Counsel for the respondent strongly submitted that, applicant chose not to attend the disciplinary hearing and that, he cannot benefit from his own wrong. Counsel cited the case of ***Bi Hawa Mohamed v. Ally Sefu*** [1983] T.L.R 83 and ***Mustafa S. Wambali v. Bahari Eagles Foundation Limited***, Revision Application No. 24 of 2023, HC (unreported) to support his submissions that applicant cannot be allowed to benefit from his own wrong because he was served twice to attend the disciplinary hearing and refused. He argued that, applicant cannot be heard now complaining that he was denied right to be heard. Counsel for the respondent submitted further that, the complaint by applicant that he was denied right to be heard is an afterthought.

Counsel for the respondent submitted that, all cases cited by the applicant are distinguishable because, applicant was accorded right to be heard but denied himself that right. Counsel for the respondent concluded his submissions by praying the application be dismissed for want of merit.

I should point at this juncture that; applicant did not file a rejoinder.

I have examined evidence of the parties in the CMA record and considered submissions made by the parties in this application and find that, there are two issues to be answered by this court namely (i)

whether, termination was fair be it substantively alone or both substantively and procedurally and (ii) what relief(s) are the parties entitled to.

It was evidence of Patricial Christopher (DW1) that, on 11th February 2020, in presence of Suleiman H. Venance, a trade union representative, applicant refused to receive or to be served with the notice to attend the disciplinary hearing (exhibit D1), as a result, hearing proceeded on 13th February 2020 and the disciplinary hearing committee issued a warning letter (exhibit D2). DW1 testified further that, on 24th February 2020, applicant was served with the said written warning (exhibit D3), but applicant refused to sign. It was further evidence of DW1 that, on 4th March 2020, applicant was served with another notice to attend disciplinary hearing on 6th March 2020 for violation of employment rules or procedures (exhibit D4) but also, he refused to honour service. It was evidence of DW1 that, applicant refused to receive exhibit D4 in presence of Peniel Iginatio Koloina and Suleiman H. Venance all being members of the trade union. It was also evidence of DW1 that, due to that refusal to sign the notice to attend the disciplinary hearing, on 6th March 2020, disciplinary hearing proceeded in absence of the applicant and tendered minutes of the disciplinary hearing (exhibit D5) to that effect. DW1 testified further that, applicant was found guilty of the

misconduct of absenteeism, as a result, on 26th March 2020, he was served with a letter (exhibit D6) showing that his employment was terminated due to absenteeism but refused to sign. DW1 testified further that, on 27th March 2020, applicant signed and received termination letter (exhibit D7). DW1 also testified that, applicant was paid his terminal benefits as per exhibit D8 and concluded that termination was fair both substantively and procedurally. I should point out albeit briefly that, all the aforementioned exhibits were received in evidence without objection. Testifying under cross examination, DW1 stated that, applicant was supposed to acknowledge service and ask clarification of the charge if he did not understand, for him to prepare his defence.

Michael Mokiwa (DW2) the supervisor of the applicant, testified that applicant was coming at work and leaving as he wished. Paniel Kolowa (DW3) testified that he is TUICO branch secretary and that he witnessed applicant refusing to be served with exhibits D3, D4 and D6.

On the other hand, Deodatus Tabu Tarimo (PW1), the applicant, testified that, his employment with the respondent commenced on 24th July 2017 (exhibit P1) at monthly salary of TZS 180,000/= and that, his employment contract was for unspecified period. PW1 testified further

that, he prayed for leave but the respondent refused, as a result, he (PW1) reported to Labour officer (exhibit P2) but upon his return to office, he was assaulted and injured. He further testified that, he reported at police and was issued with Police Form No. 3(PF3) exhibit P3. PW1 testified further that, he was never called to attend the disciplinary hearing for absenteeism and that, one Benard gave him permission not to attend at work. PW1 also testified that he was not paid his terminal benefits. In his evidence applicant (PW1) is also recorded stating: -

> *"Nipo mbele ya Tume kwa sababu nilikuja wasema labour ofisi wameninyima likizo ya mapumziko. Naomba towa uthibitisho wangu wa malalamiko kwa labour officer."*

English translation of the quoted evidence is that, I am before the Commission because I reported them to the labour office for denial of my leave. I pray to tender my complaint to the labour officer as proof. It is clear in my mind that, according to the applicant, the dispute centered on denial of his leave.

Giving evidence under cross examination, applicant (PW1) maintained that he complained before the labour officer for refusal to be granted leave. PW1 while under cross examination is also recorded stating: -

"Nilikataa kupokea barua ya wito wa kikao cha nidhamu kwa kuwa sikupaswa kuitwa kikao cha nidhamu…niliwahi kuitwa vikao viwili…Nilileta malalamiko yangu kwa labour Officer mwezi wa 9 tarehe moja 2018."

I should point out that, the alleged denial of leave and the alleged assault occurred in 2018 and has nothing to do with termination of applicant's employment in 2020. It is my view that, it is clear from the evidence of the parties that, applicant was served with a notice to attend the disciplinary hearing and refused to attend. In my view, applicant cannot be heard now complaining that he was denied right to be heard. I have carefully examined evidence of the applicant (PW1) and find that, apart from stating that he refused to attend disciplinary hearing, he did not testify that termination of his employment was unfair. I therefore agree with submissions by counsel for the respondents that, all cases cited by applicant relating to violation of right to be heard cannot apply in the application at hand. It is clear from uncontroverted evidence of the respondent that, after refusal of the applicant to be served with the notice to attend the disciplinary, hearing proceeded in his absence. He therefore deprived himself right to be heard. I therefore dismiss the 1st ground and 3rd grounds for lack of merit.

It was submitted by the applicant that exhibit D4 was not self-explanatory enough to enable him to prepare for his defence. It is my view that, this complaint would have been valid had applicant accepted service and attend disciplinary hearing. As it is, that ground cannot be accepted. More so, in his evidence, applicant did not state that he did not understand exhibit D4 or that, he failed to prepare his defence because the said exhibit lacked sufficient information for him to prepare his defence. In my view, most of the issues raised by the applicant in his submissions were not raised at CMA and in fact, they are not part of his evidence. Matters that are not part of evidence of the parties cannot be considered by the court in making its decision. The Court of Appeal clearly stated in the case of ***Attorney General vs Maalim Kadau & 16 Others*** [1997] T.L.R 69 Tanzilii media neutral citation (Civil Application No. 51 of 1996) [1997] TZCA 84 when it held:-

> *"It hardly needs to be overemphasized that it is highly improper on the part of the court to rely on or to take into account radio and newspapers reports as the basis of deciding the case. Time and again this Court has expressed the correct position in law for the courts in administering justice. The Courts should base their decisions on nothing else other than the evidence adduced in court and the applicable law in the circumstances of the case. In the instant case it is inexplicable why the learned judge fell into the serious error of taking into account press and radio reports as the basis of deciding the case. This was, in our*

view, highly improper. We urge the courts to refrain from such practices in future."

The quoted holding of the Court of Appeal tells all as to what the court should be considered in deciding cases before it. Since what is complained by the applicant are not in his evidence, I find that the 2nd ground is also devoid of merit.

For the foregoing, I hereby dismiss this application for want of merit.

Dated at Dar es Salaam on this 11th August 2023.

B. E. K. Mganga
JUDGE

Judgment delivered on 11th August 2023 in chambers in the presence of Deodatus Tabu Tarimo, the Applicant and Issa Mrindoko, Advocate for the Respondent.

B. E. K. Mganga
JUDGE