IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT MWANZA

REVISION APPLICATION NO. 10 OF 2018

LEONARD SAMSON MIRONDO.....APPLICANT
VERSUS

EDEN NURSERY AND PRIMARY SCHOOL.....RESPONDENT

JUDGMENT

16/10/2018 & 29/01/2019

Gwae, J

The applicant, **Leonard Samson Mirondo** was an employee of the respondent, **Eden Nursery and Primary Schools** since 5th March 2016 as a teacher. He was however on the 26th September 2016 terminated for absenteeism and other misconducts as indicated in the 2nd termination letter dated 21st November 2016.

Having been dissatisfied with the purported termination the applicant preferred his dispute to the Commission for Mediation and Arbitration of Mwanza at Mwanza complaining to have been unfairly terminated on the ground that he was not availed an opportunity of being heard and reason

for termination was not fair. In its conclusion, the CMA found the termination against the applicant to be fair as the applicant unreasonably refused to attend the disciplinary proceedings.

Aggrieved by the CMA arbitral award, the applicant preferred a revision by this court under section 91 (1) (a), (b) and (2) (a), (b) and 94 (1) (b) (i), (d),(e) of the Employment and Labour Relation Act. No. 6 OF 2004 and Rules 24 (1) and (2), (a), (b), (c) (d), (f) and (3) (a), (b) (c) (d) and 28 (1) (c), (d) and (f) of the Labour Court Rules GN No. 106 of 2007 basing on the following grounds;

i. That, the arbitrator totally failed or neglected to consider the facts relating to his absence from the work as a result of injury sustained due to the act of one of the respondent's employers
ii. That, the arbitrator erred totally by considering manufactured and fabricated documentary evidence that were tendered by the respondent indicating that the applicant refused to attend disciplinary hearing convened by the respondent
iii. That, the arbitrator made out unrealistic findings by failing to consider the apparent legal reality that even if the alleged disciplinary committee occurred still it was improperly constituted because it was chaired by the School Manager who was also the returning Officer to the applicant and was the one

who terminated the employment of the applicant as indicated in the letter dated 19th September 2016 and 26th September 2016

iv. That, the arbitrator considered matters which were not pleaded

v. That, the arbitrator improperly analyzed the evidence tendered by the parties and thus arrived to unfair and unjust decision

During hearing of this application, the applicant appeared in person whereas the respondent was enjoying legal services from Miss Gladness. The applicant relied on his affidavit adding that absence from his work was associated with his sickness and his subsequent admission well known by the respondent's Manager.

Miss Gladness humbly sought for adoption of the respondent's notice of opposition adding that the alleged forgery ought to be disregarded as the same issue was not raised during arbitration; she finally prayed this court to be pleased to have this application dismissed for want of merit.

In his rejoinder, the applicant strongly argued that he raised the issue of forgery of signature during arbitration and that he also insisted that the School Manager ought not to conduct disciplinary proceeding except that he was to submit the report to the disciplinary proceeding committee or the school Board.

Having briefly given gist of this application, I should now turn back to determination of the application.

In the **1st ground**, the applicant is found complaining that the reasons for his absence were not considered by the learned arbitrator. Looking at the opening statement by the parties, it seems as if the respondent was denying the fact that the applicant had sustained injuries allegedly caused by one of the respondent's employee but paragraph 2 of the termination letter dated 21st November 2016 indicates such fracas between the applicant and a teacher known by names of Mwalimu Jumanne. For the sake of avoidance of doubts, paragraph 2 of the said letter is herein under reproduced;

> ("Mwezi wa 8 Tarehe 12 ulipigana shuleni na Mwalimu Jumanne ambapo hairuhusiwi kazini, hivyo ni kosa la jinai katika utendaji kazi")

Considering the words quoted above, it sounds to me clearly that there was fracas in the place of work and probably the applicant sustained injuries as alleged by him however it is my considered opinion that alone does not justify an employee to be absent from his or her place of work without leave or permission from his or her employer. The applicant in our

dispute is evidently observed to have been absent from work for more than 6 days without permission. Hence the respondent had valid reason for such termination as the applicant had no formal permission of absence from work.

If the applicant was seriously injured as such making him incapable of furnishing information to his employer that would be evidenced by the PF3 dated 19th September 2016 while the occurrence was of 12/9/2016. However the PF3 which is lucidly unfilled as opposed to medical chits annexed and dated 27th September 2016, one day after the respondent's issuance of termination letter dated 26th September 2016. The medical chits bearing names of the applicant may not necessary reflect the occurrence dated 13th September 2016 or it seems as an afterthought.

Regarding the complaint of forgery of documents so tendered and received during arbitration (2nd ground), the learned advocate for the respondent is seriously opposing this ground on the ground that the same was not raised during arbitration whereas the applicant is saying that he raised the same. I have examined the CMA record and noted that, it is silent on whether the applicant was afforded an opportunity to either object or not to the sought tendering of exhibits (DE1-DE4) or otherwise.

That amount to denial of right to be heard. The right to be heard includes right to make defence, right to cross examine or right to object or comment in respect of any document sought to be tendered for evidential value during trial. It is therefore in this line of the outstanding principle; the learned arbitrator erred in law for not availing the applicant an opportunity to comment on the documents produced and admitted during arbitration.

As to the **3rd ground above**, it is trite law that an adjudicator must be impartial as was rightly stressed in a persuasive authority in **Galaxy Paints Co Ltd v Falcon Guards Ltd** (1999) 2 EA 83 with approval of a foreign decision in **R v. Bow Street Metropolitan Stipendiary Magistrate and others ex parte Pinochet Ugarte** (number 2) [1999] 1 All ER 577 at 586, where the House of Lords observed that and I quote

> "The fundamental principle is that a man may not be a Judge in his own cause. This principle, as developed by the Courts, has two very similar but not identical implications. First it may be applied literally: if a Judge is in fact a party to the litigation or has a financial or proprietary interest in its outcome then he is indeed sitting as a Judge in his own cause. In that case, the mere fact that he is a party to the action or has a financial or proprietary interest in its outcome

is sufficient to cause his automatic disqualification. The second application of the principle is where a Judge is not a party to the suit and does not have a financial interest in its outcome, but in some other way his conduct or behaviour may give rise to a suspicion that he is not impartial, for example because of his friendship with a party. This second type of case is not strictly speaking an application of the principle that a man must not be a Judge in his own cause, since the Judge will now normally be himself benefiting, but providing a benefit for another by failing to be impartial".

In our instant dispute, One **Chalote Mbabazi, the** School Manager, employer (DW1) in the meeting held on 23rd September 2016 acted as chairperson of the Disciplinary Committee and it is quite depicted in the proceedings that she admitted to have chaired the meeting ("S-Je kikao kiliongozwa na nani-J- Mwenyekiti wa Bodi amabaye ni mimi")

As evidenced by both letters of termination of the applicant's employment, the said Mbabazi was the employer, that being the case she had direct interest in the proceedings, it follows therefore, she could not be impartial in anyhow during disciplinary proceedings. This is a fatal irregularity committed during the alleged Disciplinary Proceeding. The respondent was to refer the alleged applicant's misconducts to the School

Board so that the dispute could be dealt pursuant to the contract of employment (see Paragraph 13 of the employment contract-DE1)

On the **4th ground**, it goes without saying that the arbitrator in his judgment included the matters which were patently not pleaded by the parties for instance issues of repatriation allowance and subsistence allowance. It is the requirement of the law that the court or quasi judicial body has to frame disputable issues after consultation with the parties or their representatives. In our case, the issues allegedly framed are only featured in the judgment but not in the proceedings, with outmost due respect, this is absolutely wrongly.

It is a therefore requirement of the law not to consider and grant relief (s) not pleaded, in **Makori Wassaga v. Joshua Mwaikambo and Another** (1987) TLR 88 (CAT)

> "In general, and this is I think elementary, party is bound by his pleadings and can only succeed according to what he has averred in his plaint and proved in evidence"

In our instant case, it is glaringly clear that the applicant did not plead subsistence allowance or repatriation allowance or the framed issues are not backed by the proceedings, hence it was a total misdirection on the

party of the arbitrator to frame issues not based or founded on the parties' pleadings (see initial statement of the applicant received by the CMA on 3rd February 2017). The final ground is thus answered in affirmative for reasons stated in the 3rd ground

Having said and done as herein above, I am of the finding that the purported termination was unprocedural unfair, the arbitral ward was improperly procured, the same is hereby revised and set aside. The applicant is entitled to one month salary in lieu of notice and compensation of twelve (12) months salaries subject to tax reduction.

It is so ordered.

M. R. Gwae
Judge
29/01/2019

Court: Right of Appeal fully explained.

M. R. Gwae
Judge
29/01/2019