IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF MWANZA)

AT MWANZA

LABOUR REVISION NO. 50 OF 2020

NYANZA ROAD WORKS LIMITED..... APPLICANT

VERSUS

JUMA ABDALLAH ..... RESPONDENT

JUDGMENT

11th May & 20th July, 2021

ISMAIL, J.

This decision is in respect of the application for revision, preferred by the applicant, calling upon the Court to exercise its revisional powers to call and examine the record of the proceedings of the Commission for Mediation and Arbitration (CMA), in respect of Labour Dispute No. CMA/NYAM/448/2019/02/2020. The award emanating therefrom was delivered on 29th May, 2019. Having adjudged the termination unlawful, substantively and procedurally, the arbitrator went ahead and ordered that the respondent be paid compensation which is equivalent to salaries for 24 months. This decision did not go well with the applicant, hence her decision to prefer the instant application which is supported by an affidavit sworn by James Mwakisisya, the applicant's principal officer. The affidavit has raised

eleven areas of dissatisfaction and in respect of which the Court's revisional powers are called into action.

The application has been fiercely challenged by the respondent, through a counter-affidavit affirmed by the respondent himself. The contention is that reasons for the termination were not proved, as no test was carried out to establish the respondent's drunkenness. The respondent further averred that the procedural aspects that precede the disciplinary action were not adhered to.

In the hearing which was conducted by way of written submissions, it was Mr. Ludovick Joseph, learned counsel for the applicant who began the onslaught by submitting on the point of jurisdiction. On this, the counsel's contention is that the CMA entertained the matter, while it did not have jurisdiction over a matter that arose at Kisorya in Bunda District, and that the respondent declared so in the pleading (CMA Form No. 1) to which he is bound. This is consistent with the decision in ***James Funke Gwabilo v. Attorney General*** [2004] TLR 61, quoted with approval in the Court's decision in ***Huawei Technologies Tanzania Co. Ltd v. Ramadhan Hassan Mshana & Another***, HC-Labour Revision No. 49 of 2018 (unreported). He argued that filing of the matter in CMA Mwanza was contrary to rule 22 (1) of GN. No. 64 of 2007 (unreported).

With regards to fairness of the termination, Mr. Joseph's argument is that the termination was fair in substance and procedure. The counsel argued that termination was actually a response to the respondent's wish for opting out of employment. He contended that the respondent was invited to a disciplinary committee hearing which was conducted in the respondent's presence, meaning that right to be heard was observed. This, the counsel argued, is evidenced by minutes of the disciplinary hearing and an invitation letter both of which were tendered by DW1. It was the counsel's contention that right to be heard was accorded to the respondent.

With respect to the reason for termination, Mr. Joseph's contention is that the respondent was in the drinking spree, and that he was under the influence of alcohol on the date he appeared before the disciplinary committee. He decried what he argued as the arbitrator's conduct of acknowledging that the respondent's conduct merited a termination while at the same holding that it was wrong to terminate the respondent. The counsel argued that the letter which referred the respondent to head office due to his continued drunkenness, meant that an investigation into the respondent's wrong doing was carried out. It was the applicant's view that no investigation was conducted is utterly wrong.

Regarding the non-adherence to items in rule 13 of GN. No. 42 of 2007, the applicant's argument is that the rule 11 allows the employer to dispense with some of requirements provided that omission to adhere to them does not occasion a failure of justice. He concluded that the reasons for termination and the procedure followed in the process were fair, and that the punishment meted was fitting in the circumstances.

On the alleged variance of signatures, the argument was that without any expert proof on the three signatures the talk of forgery was bare and unproven. The applicant's counsel contended that singling out the signature on the referral form as genuine while the rest were forged was an erroneous conduct. Mr. Joseph argued that both signatures were genuine and they ought to have been accorded equal treatment.

With respect to termination by the Committee, the applicant's take is that the arbitrator's finding was erroneous, because DW1's testimony was quite clear on the fact that the respondent was called by the administrative officer who communicated the employer's decision to terminate his services. Regarding payment of benefits barely five days from the date of the disciplinary hearing, the counsel's take is that the law sets no timeframe within which benefits should be made subsequent to termination of services of an employee.

On the reliefs awarded, the applicant faulted the payment of compensation for 24 months, holding that the applicant's employment was for a fixed term which would entitle the respondent to only payment of salaries for the unexpired part of the contract, in case the finding is that the termination was unfair. A number of cases were cited to fortify the contention. These are: ***Nyanza Road Works v. Safari Mayunga Ntobi***, CAT-Revision No. 38 of 2019; ***David Nzaligo v. National Microfinance Bank Plc***, CAT-Civil Appeal No.61 of 2016; ***Mtambua Shamte & 64 Others v. Care Sanitation and Supplies***, HC-Labour Revision No. 154 of 2010; and ***Isack Olutu v. CSI Electrical Limited***, HC-Labour Revision No. 320 of 2019 (all unreported). The applicant's counsel argued that the notice reserved for employees on daily pay is four days' salary which sum was paid to the respondent. He contended that the arbitrator strayed into an error when he converted a specified time contract to an indefinite time frame and from payment of wage on a daily basis to payment on a monthly basis.

In view of the foregoing, the applicant prayed for revision of the award and hold that termination of the respondent's contract, and payment of the benefits was properly done.

The respondent's rebuttal was fielded by Mr. Barack A. Dishon, learned counsel. With regards to jurisdiction, his argument was that the applicant's

place of abode is Bwiru in Mwanza, and that Kisorya-Bunda was just a work site. He argued that, the fact that the respondent was referred to head office following the allegation of excessive drunkenness. He relied on the testimony of DW1 who testified that the respondent's intolerable drunkenness had indicated that the applicant's activities were housed in Bwiru, Mwanza, a place at which his culpability would be established.

With regards to fairness of the termination, the counsel submitted that the known principle is that the employer is duty bound to prove that termination of an employee's employment was fair and consistence with section 39 of the Employment and Labour Relations Act, Cap. 366 R.E. 2019 (ELRA). Such proof is on the balance of probability, pursuant to rule 9 (3) of GN. No. 42 of 2007, read together with section 37 (1) and (2) of the ELRA. The counsel argued that, while the applicant cited drunkenness as the reason for the termination, there was no evidence to prove that the respondent had a drunkenness behavior. He argued that drunkenness cannot be determined using one's eyes or smelling.

Mr. Dishon discounted the potency of the testimony of DW1, terming it hearsay, since the contention of the respondent's drunkenness behavior was communicated to him through a letter that the said witness received from Kisorya-Bunda. The counsel concluded that, since there was no

alcoholic test carries out and, since no witness came from Kisorya-Bunda to testify on the respondent's drunkenness, then the applicant had not proved that they lost the project because of the respondent's drinking behavior.

On the right to be heard, the respondent's counsel argued that, whereas this right is guaranteed by article 13 (6) (a) of the Constitution of the United Republic of Tanzania, such right was not accorded to the respondent during the disciplinary hearing. Mr. Dishon argued that the arbitrator was right in concluding that such right was not accorded to the respondent, citing the example of item 9 of exhibit AB-2 that was blank in the spaces where names and occupation of the witnesses is found. This, he contended, implied that no witness was called to testify during the hearing. This, he argued, denied the respondent of the right to defend himself. He buttressed his argument by citing the case of ***Abbas Sherally & Another v. Abdul Sultan Haji Mohamed Fazal Boy***, CAT-Civil Application No. 33 of 2002, in which the right to be heard was held to be an inseparable right which cannot be wished away, and that a decision arrived without observing such right is a nullity, even if the same decision would have been arrived at, had the affected party been heard.

With regards to the duration of the contract of employment, the respondent's counsel refuted the contention that the contract was for a

specified period of time. He argued that, going by the documents through which payment of benefits was effected, it is clear that the respondent had already worked for two years. He argued that if 19th November, 2018 is considered to be a renewal date and 19th May, 2019 is considered to be the expiry date, then the said contract will have run for a period of six months, rendering it illegal for being inconsistent with section 14 (1) (b) of the ELRA, read together with rule 11 of GN. No. 47 of 2017 which provides as follows:

> *"A contract for a specified period referred under section 14 (1) (b) of the Act shall not be for a period of less than twelve months."*

Mr. Dishon argued that, even assuming that the contract was for a specified period of time, the applicant was under obligation to prove that termination of the said contract was in compliance with section 37 of the ELRA, and that termination procedures under Rule 8 (2) (a) and (b) of GN. No. 42 of 2007 were followed.

The counsel concluded by submitting that, since the contract contravened rule 11 of GN. No. 47 of 2017, and therefore illegal, it was proper for the arbitrator to award 24 moths' salaries. He prayed that the application be dismissed, and that the CMA award be upheld.

From these contending submissions the germane questions are mainly two. These are:

1. Whether termination of the respondent's services was, as contended by the arbitrator, unfair; and
2. Whether reliefs granted by the arbitrator are justified.

I will address these issues following the sequence adopted by the applicant. On jurisdiction, the argument by the applicant is that the CMA did not have jurisdiction to entertain a dispute whose cause of action arose in Bunda District which is outside the scope of the CMA's territorial powers. By entertaining it, the counsel argued, the provisions of rule 22 (1) of GN. No. 64 of 2007 had been flouted.

As submitted by the applicant's counsel, rule 22 (1) requires that the venue of the mediation and arbitration be where the cause of action arose. The said provisions stated as hereunder:

> *"A dispute shall be mediated or arbitrated by the Commission at its office having responsibility for the area in which the cause of action arose, unless the Commission directs otherwise."*

In order to assess the veracity or otherwise of the applicant's contention, need arises for ascertaining the cause of action and where it arose. In my view, the cause of action in the dispute before the CMA, and certainly before me, is the termination of the respondent's employment and the fairness or otherwise of such termination. From the record of the

proceedings in the CMA and the applicant's own submission, termination of the respondent's employment was a culmination of the disciplinary process which was conducted at the applicant's Bwiru office. This is where termination was effected. Noting that the respondent's complaint related to such termination, it cannot be said that such termination was effected in Bunda, where no proceedings to determine his fate were held. It is erroneous to argue that the right forum in this case would be the CMA Mara. I hold that this argument is hollow and I dismiss it.

With respect to fairness of termination, the argument by the applicant is that all aspects of fairness of the respondent's termination were followed. With regards to procedural fairness, reliance has been placed on the minutes of the disciplinary hearing (exhibit AB-2) and the letter of invitation.

It is should be noted that, the procedural aspects of the termination are governed by rule 13 of GN. No. 42 of 2007. This proceedings sets out essential steps that must be taken by the employer in effecting the termination. These include:

(i) Carrying out an investigation into the violation with a view to determining whether a hearing should be conducted;

(ii) Serving charges on the employee;

(iii) Issuing a notice of hearing and serving it on the employee at least 48 hours before the hearing;

(iv) Informing the employee of his rights, including the right to call witnesses and cross-examining witnesses of the opposite party;

(v) Right to be accompanied by a fellow employee or a representative from a trade union;

(vi) Conducting a hearing that will involve the employee and deliver a decision consistent with the requirements of the law;

(vii) Right to put a mitigation upon conviction and before imposition of the penalty; and

(viii) According the right of appeal to an aggrieved employee.

A glance at the proceedings of the disciplinary committee reveals that most of these requirements were not met. For instance, there is no evidence if investigation was carried out prior to commencement of the hearing, and it is quite uncertain if the case was serious enough to warrant a hearing. Rule 13 (1) of GN. No. 42 of 2007 obligates that investigations into allegations must precede every disciplinary hearing. The current legal holdings have gone further to hold that the findings of the investigations must be produced at the hearing. Failure to do so renders the disciplinary

process flawed and inconsistent with a fair procedure. This was held in ***Tanzania Revenue Authority v. Andrew Mapunda***, HC-Labour Revision No. 104 of 2014; ***China Railway Jian Engineering v. Shagifa Juma***, HC-Labour Revision No. 91 of 2009; and ***Rijk Zwaan Q-Sem Ltd v. Fatuma Ngomuo***, HC-Labour Revision No. 121 of 2015 (DSM- all unreported). It is not evident, either, that the respondent was given the right to cross-examine witnesses (if any) who were paraded by the applicant, or that he was informed of the right that he had to call his own witnesses to aid his case in the course of the hearing. At the conclusion of the proceedings and after issuance of the decision, the respondent was not taken through an appeal process or any recourse that there may have been for an aggrieved person.

The applicant's counsel has relied on the minutes of the disciplinary meeting, otherwise known as the hearing form to justify her contention that the hearing process was fair. What comes out however is that essential parts of this form had some of the crucial information missing. This includes names of those who attended the hearing. In item 13 the respondent's name is missing in the list of those who were in attendance, while those who attended had their designations missing. The item that would carry the testimony of those who testified is blank, and it is not known if any witness attended the disciplinary hearing.

The applicant's counsel considers this to be an allowable omission under rule 11 of GN. No. 42 of 2007. With respect, I decline to get along with this line of argument. This is a fatal omission which cannot be wished away with such ease as the applicant tries to do. It is a mammoth failure that relegates the entire process to a mere farce. The net effect of all this is to render the termination procedurally unfair and in wanton violation of the provisions of rule 13 of GN. No. 42 of 2007.

Regarding reasons for the termination, the applicant's counsel has contended that the respondent's excessive drunkenness plummeted the respondent's ability to discharge his duties, so much so that he affected the applicant's plans for the work and caused loss. This was testified by DW1 who relied on the communication from Bunda which, in my view was too sketchy to constitute the basis for any finding of guilty. His account of facts was nothing but a hearsay narration in the sense that, it is an assertion of a person other than the witness testifying, offered as evidence of the truth of that assertion, rather than as evidence of the fact that the assertion was made (See: ***Subraminium v. Public Prosecutor*** [1956] W.L.R. 965; and ***Khalfan Abdallah Hemed v. Juma Mahende Wang'anyi***, HC-Civil Case No. 25 of 2017 (MZA-unreported). The expectation was that people from Kisorya who witnessed the respondent's drinking habits would be called

upon to testify on what was alleged in the written communication, and how that habit infracted the rules of his engagement leading to the charges he was facing. This did not happen, and I take the view that the applicant's account of fact fell short of discharging her obligation under the provisions of section 39 of the ELRA and rule 9 (3) of GN. No. 42 of 2007. These provisions cast the burden on the employer, in this case the applicant, to prove that termination of the respondent's employment was fair. The requirements under the cited provisions represents the position in normal civil cases, as captured by the Court of Appeal, in ***Godfrey Sayi v. Anna Siame (as legal representative of the late Mary Mndolwa)***, CAT-Civil Appeal No. 114 of 2012 (unreported), wherein it was stated as follows:

> *"It is similarly common knowledge that in civil proceedings, the party with legal burden also bears the evidential burden and the standard in each case is on balance of probabilities."*

It is my conclusion that termination of the respondent's employment did not meet conditions of a fair termination set out in section 37 (2) of the ELRA, and I find the arbitrator's finding in that respect justified and unblemished. I uphold it. This conclusion renders the discussion on questions of differing signatures and propriety of the termination by the committee superfluous.

The next question relates to the propriety of the terminal benefits or reliefs granted by the arbitrator. The applicant has hotly disputed the award of compensation in the sum equivalent to 24 months' salaries. The argument is that 12 months' compensation is dependent on the contract of employment being permanent or of indefinite timeframe, while the rest of 12 months are downrightly unjustified. But before I settle the contest by the parties, it behooves me to lift the lid on the status of the parties' contractual relationship. This stems from the argument by the applicant that, since the initial contract by the parties was for a duration of six months, then subsequent renewals, though not in writing, were for the same terms and duration. This has a bearing on the payment of terminal benefits. While this represents the law as it then was, its evolution has changed the landscape. The position, as it currently obtains, is to the effect that an employee who continues to render his services subsequent to the expiry of the fixed term contract is deemed to serve under the indefinite contract. This means that his contract is deemed to have been tacitly renewed and converted into a permanent employment, and the usual procedures of termination apply, including issuance of a notice prior to termination. This was accentuated in the case of ***Denis Kalua & Said Mngombe v. Flamingo Cafeteria***, HC-Labour Revision No. 210 of 2010 (DSM-unreported). This implies that the

procedural aspects of fair termination apply in such cases as they would apply in other forms of termination of indefinite contractual engagements. Needless to say, therefore, that the employees whose services are deemed to have been unfairly terminated will be eligible for payment of compensation under the provisions of sections 40 and 44 of the ELRA.

In view of the foregoing, I take the view that the applicant's attempt to treat the respondent as an employee on a fixed term contract is erroneous and has failed to resonate.

Moving on to the propriety or otherwise of the payment of compensation, my finding is that, while the law allows the arbitrator to order compensation in excess of the sum amounting to 12 months' salaries, such sum must wholly constitute a compensation for unlawful termination. In the instant matter, the applicant's concern is that extra 12 months that has been paid to cater for the period in which the arbitral proceedings were pending was untenable. This concern is valid and legitimate. The arbitrator's discretion in ordering compensation does not extend to an indiscriminate dishing out of sums, ostensibly to settle claims which do not fall under section 40 of the ELRA. If there are any claims falling out of the scope of section 40 of the ELRA, then the same ought to have been handled through a separate head of claims. I, therefore, vary this part of the award and chalk

off that part of the compensation. While this is the position with respect to the extra claims, I find nothing blemished with respect to the compensation for the unfair termination. I take that the sum equivalent to 12 months' wages constitutes a reasonable and adequate recompense for the breach perpetrated by the applicant. I hold that the applicant's contention in this respect is unfounded.

In the upshot of all this, save for the award of extra compensation that is chalked off, the rest of the application is barren of fruits and it is hereby dismissed. Consequently, the arbitrator's award is hereby upheld.

Order accordingly.

DATED **at MWANZA** this 20th day of July, 2021.

M.K. ISMAIL

JUDGE

Date: 20/07/2021

Coram: Hon. C. Tengwa, DR

Applicant: Mr. Milembe Lameck – Present

Respondent: Absent

B/C: J. Mhina

Court:

Judgment is delivered today in the presence of the Counsel for the applicant (Milembe Lameck).

C. Tengwa

DR

At Mwanza

20th July, 2021