IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

(CORAM: MUNUO, J.A., KIMARO, J.A. And MJASIRI, J.A)

CIVIL APPEAL NO. 30 OF 2012

AFRICAN EXPLOSIVES (T) LTD ..... APPELLANT

VERSUS

1. MINISTER OF LABOUR
2. ATTORNEY GENERAL .....**RESPONDENTS**

(Appeal from the Judgment of the High Court of Tanzania at Tabora)

(Kaduri, J)

dated 4th day of August, 2011
in
Misc. Civil Application No. 44 of 2009

.....

JUDGMENT OF THE COURT

23 & 28 May, 2012

MUNUO, J.A:

The appellant, African Explosives (T) Ltd, through the services of Mr. Chami Matata, learned advocate, is challenging the dismissal of an action for certiorari in Miscellaneous Civil Application no. 44 of 2009 in the High Court of Tanzania at Tabora on the 4th August, 2011, before Kaduri, J. Both co- respondents namely the Minister for Labour and the Attorney General were represented by Mr. Juma Masanja, learned State Attorney.

The employee who was summarily dismissed by the appellant was one Eliya Ndalama. He appeared in this appeal as an interested party.

The facts of this case are straight forward. As reflected in the dismissal letter Annexture A, on the 10th December, 2006 Eliya Ndalama, then an employee of the appellant company, drove a company vehicle T911AAC from the surface of the mine to underground without authority and without being in possession of a valid driving licence. He also failed to stop when required to do so by the mines security. Subsequently, an Enquiry of the erring employee was conducted whereupon he was summarily dismissed.

The dismissal letter reads verbatim:

> " 27 December 2006
> Eliya Ndalama
> Company Number 112
> Bulyanhulu Site
>
> Dear Mr. Ndalama
>
> LETTER OF DISMISSAL
>
> 1. Following due notice of the intention to hold a disciplinary enquiry in respect of yourself concerning an allegation of unauthorized use of a company vehicle. In that notice you were alerted to your right of representation at the hearing

which was held on 13 December 2006 at AEL Bulyanhulu Site to determine the facts of the matter.

2. In brief, it was determined from information made available to me from the enquiry that on the 10th December 2006 at Bulyanhulu Gold Mine, you drove company vehicle T911AAC from surface to underground without authority and without being in possession of a valid driver's licence. You also failed to stop when you were approached by BGM personnel for not having the rotation light switched on.
3. The Enquiry Chairman having examined the facts placed before him, found the allegations to be proven. Your company personal file was then examined and revealed no previous breaches.
4. As a result thereof, recommendations were made concerning your dismissal. You were verbally advised of the dismissal recommendation on 14 December, 2006.
5. This letter serves as a formal confirmation of your dismissal from African Explosives (T) Ltd. You are hereby informed of your right to refer the dispute in writing, to Labour Officer, Kahama District within 7 days of the date of this letter, in accordance with section 21 of the Security of Employment Act (1964) as amended.
6. It is a requirement of the OHS Act No. 85 of 1993 that you present yourself for an exit medical assessment of which arrangements can be made with the SHE Officer at EAL

Bulyanhulu Site. Failure to do so could nullify any future claim against the company.

7. Please report to the Human Resources Officer at Mwanza office, after 1st January 2006, for termination benefits if any, also for your NSSF claim forms.

Yours truly,
Sgd.
Mark Benong
Managing Director – Acting
Cell +255 (0)786 350 000. "

The above letter of dismissal is endorsed:

" Received on 27/12/2006
by Eliya Ndalama.

Sgd."

The dismissed employee exercised his right to refer the matter to the Labour Officer, Kahama as evidenced by annexture B, the decision of the Reconciliation Board. The decision reads in Kiswahili;

" NYONGEZA YA KWANZA
SHERIA YA USALAMA KAZINI, 1964
UAMUZI WA BARAZA LA USULUHISHI
(Ijazwe na Mwenyekiti wa Baraza)

Kwa (i) Mwenyekiti/Katibu

.....

.....

(ii) M/S AFRICAN EXPLOSIVES LTD
P.o. Box 2773,
MWANZA (Mwajiri)

(iii) ELIYA NDALAMA
P.o. Box 2773
MWANZA (Mrufani)

1. Kuhusu ELIYA NDALAMA (Jina la Mfanyakazi)
Aliyeajiriwa na AFRICAN EXPLOSIVES LTD

2. Baraza hili baada ya kufikiria kwa makini rufaa iliyoletwa na mfanyakazi aliyetajwa hapo juu, limeaamua mnamo tarehe ya leo hivi vifuatavyo:
ADHABU YA KUFUKUZWA KAZI ALIYOPEWA MRUFANI, SIYO SAWA NA SIYO HALALI, MFANYAKAZI ARUDISHWE KAZINI NA KUPEWA ONYO KWA SABABU:-

Sahihi K.N. TULAWANGO
MWENYEKITI
BARAZA LA USULUHISHI
KAHAMA.

Tarhe 05/01/2007

N.B: Masharti na haki ya kuomba rufani kwa Waziri wa Kazi na Maendeleo ya Vijana imeelezwa kwa mfanyakazi/Mwajiri katika muda usiozidi siku 28 tokea tarehe ya uamuzi wa Baraza hili.

KWA SABABU

1. Kitendo cha kuchukua gari bila idhini ya mwajiri, ilikuwa ni lazima (necessary) na mrufani alifanya hivyo kwa madhumuni ya kufanikisha shughuli za mwajiri wake na siyo kwa shughuli zake binafsi. Kwani asingefanya hivyo (kuchukua gari na kuwahisha funguo za magazine ulipuaji usingefanyika) ingekuwa hasara kubwa kwa mrufani binafsi na kwa mwajiri wake ambapo angeweza hata kunyimwa mkataba na mwajiri wake mkuu i.e KMCL.

2. Suala la site license hutolewa na mwajiri wake siyo mfanyakazi kutafuta.

K.H. TULAWANGO
MWENYEKITI
BARAZA LA USULUHISHI
KAHAMA."

The summary of the decision of the Kahama Reconciliation Board is to the effect that the employee, Eliya Ndalama, drove into the underground mine

without a valid licence or his employer's authority as a matter of urgency. He did so for the benefit of his employer, not for his personal gain. Had he not taken that action (to drive from the surface to the underground mine to deliver the magazine key, exploding the mine would not have been done) the employer and himself would have suffered a big loss which would have caused the principal employer KMCL, to refuse to give a contract to the appellant.

The Reconciliation Board also held that it is the employer who issues valid driving licences to employees; the latter do not look for licences. Dissatisfied with the decision of the Kahama Reconciliation Board, the appellant referred the dispute to the Minister for Labour vide Form 7, Annexture C to the affidavit in support of the application for certiorari. In the reference to the Minister, the appellant submitted that it was not necessary for the employee to drive from the surface to the underground mine without the authority of his employer. If there was urgency, the employee should have called his supervisor who would have dealt with the matter. On site licences, the appellant submitted that such licences are issued only to personel employed as mine drivers; the employee, Eliya Ndalama was not one of the mine drivers so he had no valid licence for

driving underground. For these reasons, the appellant prayed that the Minister for Labour reverses the decision of the Kahama Reconciliation Board. The Reference to the Minister was not successful. The employer then instituted the action for certiorari in the High Court seeking:

> "(a) An order of certiorari removing and quashing the decision of the Minister for Labour dated 29/04/2007 emanating from a reference from Reconciliation Board decision dated 05/01/2007.
>
> (b) An order that the Minister deal with the matter according to law and the direction of the Court if any;
>
> (c) Costs of the application;
>
> (d) Any other relief deemed fit by the Court."

As stated earlier on, Kaduri, J. dismissed the application. Hence the present appeal.

In this appeal, Mr. Chama Matata learned counsel for the appellant, filed three grounds of appeal. He also filed a Written Submission to support the same. At the hearing, Mr. Matata reiterated that the

employee, Eliya Ndalama, was dismissed for a disciplinary wrong, that is, driving from the surface to the underground without a valid licence and also without the authority of his employer. The appellant's counsel contended that the employee was on an errand of his own and not for the benefit of the appellant, as the lower tribunals held. He further faulted the Minister for not complying with the law which prescribes summary dismissal for driving to the underground mine without a valid licence and without authority. The counsel for the appellant referred us to the Mining Policy and Use of Motor Vehicles, Annexture F to the affidavit annexed to the chamber summons for the certiorari action in the High Court which states under item 14.1:

> " 14. 1: Nidhamu ya Udereva –Wakandarasi. Makampuni ya wakandarasi hayapatiwi msamaha wa hatua za kinidhamu zilizotajwa kwenye kifungu cha 14. Kushindwa kufuata sera & sheria za barabara za BGM *kunaweza kusababisha kufukuzwa mgodini* kwa mfanyakazi wa kandarasi, au hata, kampuni yenyewe ya ukandarasi"

Meaning:

> " 14: The Discipline of Driving- Contractors. Contractors' companies will not get leniency in the disciplinary actions listed under item 14. Failure to

comply with the policy and traffic laws of BGM can cause dismissal from employment in the mine to an employee of a contractor, or even the contractors' company itself."

Counsel for the appellant argued that the Minister of Labour failed to comply with the provisions of sections 20 and 21 (1) of the Security of Employment Act, Cap. 387 R.E.2002 as well as item 1(h) of the Second Schedule to the Act. Had the Minister complied with the above provisions of law, counsel for the appellant urged, she would have reversed the decision of the Kahama Reconciliation Board and upheld the appellant's disciplinary sanction of dismissing the employee, Eliya Ndalama, for driving from the surface to the underground mine without a valid licence and without the authority of his employer.

The appellant's learned counsel cited the case of **Adecon Fisheries (T)Ltd versus Director of fisheries and Two others (1996)TLR 352** wherein the High Court of Tanzania held:

" *(iv) The discretion which the first respondent had to exercise in awarding fishing licences had to be exercised with a judicial mind: in refusing the applicant's licence the first and second*

respondents had acted under a false belief that the appellant's vessel exceeded the specified 500 bhp and the decision was accordingly not reached on the basis of fairness and justice and had to be quashed"

In the present case, counsel for the appellant maintained, the learned judge was labouring on the mistaken belief that the employee drove into the underground mine under emergency and that such driving was for benefit of the appellant which was not true. On that account, the learned judge should have allowed the application and should have ordered the Minister to reverse the decision of the Kahama Reconciliation Board, Mr. Matata argued.

Counsel for the appellant also cited the case of **Sinai Mirumbe versus Muhere Chacha (1990) TLR 54** in which the Court of Appeal of Tanzania held that:-

"(i) An order for certiorari is one issued by the High Court to quash proceedings of the decision of a subordinate court or tribunal or public authority where, among others, there is no right of appeal.
(ii) The High Court is entitled to investigate the proceedings of a lower court or tribunal or public

authority on any of the following grounds apparent on the record:

(a) Taking into account matters which it ought not to have taken into account;

(b) Not taking into account matters which it ought to have taken into account;

(c) Lack of excessive jurisdiction;

(d) The conclusion arrived at is so unreasonable that no reasonable authority could ever come to it;

(e) Rules of natural justice have been violated;

(f) Illegality of procedures or decision.

In this case, counsel for the appellant further contended, the learned judge should have found that the employee did not drive into the underground mine for the benefit of his employer. He did so not for the benefit of the appellant so he did so for his own personal motives, counsel contended. The decision of the Minister was unreasonable and not supported by the Mine Policy and laws, Mr. Matata argued. In **Sinai's case cited supra,** Counsel for the appellant pointed out, the learned judge properly granted an order for certiorari because the decision of the subordinate court was

contrary to the evidence and the magistrate was biased against the respondent and the trial court failed to comply with the provisions of section 15 of the Stock Theft Ordinance, Cap. 422. In this case, the learned judge should have found that the Minister for Labour had not complied with the provisions of sections 20 and 21(1) of the Security of Employment Act, Cap 387 and item I (h) of the Second Schedule to the said Act, counsel for the appellant submitted. Had the learned judge done so, counsel observed, he would have allowed the application for certiorari and quashed the decisions of the lower tribunals.

Mr.Matata further submitted that the Court should interfere with the decision of the High Court because the learned judge misdirected himself and arrived at the wrong decision. On this, counsel for the appellant cited the case of **Mbogo & another versus that (1968) E.A 93** in which the erstwhile Court of Appeal for East Africa held:

> *" A Court of Appeal should not interfere in the exercise of the discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision; or unless it is manifest from the case as a whole that the judge was clearly wrong in the*

exercise of his discretion and that as a result there has been misjustice.."

It is the view of Mr. Matata that the Minister for Labour failed to comply with sections 20, 21 (1) and item 1 (h) of the Second Schedule to the Security of Employment Act, Cap. 387 R. E. 2002 so the High Court should have allowed the application for certiorari with costs. Hence, counsel for the appellant urged us to reverse the decision of the High Court and allow this appeal with costs.

Mr. Juma Masanja, learned State Attorney supported the decision of the High Court and urged us not to interfere with it. Adopting his written submission in reply to the appellant's written submission, the learned State Attorney observed that the proceedings of the Enquiry which led to the summary dismissal of the employee, Eliya Ndalama were not availed to the parties or filed in the High Court to enable the judge to appraise the same, noting under the principles pronounced in **Mirumbe and another versus Muheze Chacha** *supra.*

The learned State Attorney further cited the case of **Josiah Balthazar Basi and 38 Others versus Attorney General and another (1998) TLR 331** in which the High Court held that:-

> *"apart from the applicants obligation to make a full and frank disclosure of all material facts on which they rely on in their application for certiorari* ***uberrima fides*** *is also required before leave is granted".*

The learned judge considered the materials before him and found the decision of the Minister sound so he exercised his discretion properly and dismissed the application, the learned State Attorney submitted.

Contending that the learned judge rightly considered item I (h) of the Employment Act, Cap. 387 R.E. 2002; which states, inter-alia:

> *I (h) neglects or fails to carry out his duties so as to endanger himself or others or property or neglects or fails to comply with an instruction relating to safety or welfare".*

On the face of it, the learned State Attorney observed, there was no material which would have enabled the High Court to come to a different conclusion because no charges were laid by the appellant against the

dismissed employee to show that he had been negligent or that he had failed to carry out his duties so as to endanger himself or others or property or that he had failed to comply with instructions relating to safety or welfare. Driving without a valid driving license and driving to the underground mine without the employer's authority would not constitute neglect or failure to perform his duties within the context of the provisions of item I (h) of the Security of Employment Act, Cap. 387 R. E. 2002 so the learned justice rightly dismissed the action for certiorari. In those circumstances, the appeal ought to be dismissed with costs, Mr. Masanja urged.

The issue is whether the learned judge properly exercised his discretion in determing the matter before him.

We firstly wish to reaffirm the decision of the Court in the case of **Mirumbe and another versus Muhere Chacha**, cited *supra* which listed the criteria for investigation by the High Court in a prerogative action such as the matter before us. Whereas there are no documents on record to reflect what transpired before the Kahama Reconciliation Board, as evidenced by Board's document, Form 5, marked annexture B; the

appellant's. reference to the Minister vide Form 7 and its accompanying statement, annexture C and D; the Minister's decision on Form 8, annexture E dated the 29/04/2007; and the Policy of Using Vehicles at the Barrick Gold Mines on annexture F, which documents were considered by the learned judge but found not to be sufficient for reversing the decision of the Minister for Labour, we hesitate to interfere with the decision of the Minister for Labour for the following reasons.

As it is, the charges against the employee at the initial enquiry are unknown and not on record. We only discern from the Letter of Dismissal, annexed to the Chamber Summons of the certiorari suit that the employee Eliya Ndalama had been summarily dismissed for driving from the surface to the underground without authority and that he had done so without a valid driving licence. The absence of the Enquiry proceedings and charge which initiated the summary dismissal is a fatal omission. Under the circumstances the learned judge could not have arrived at a different conclusion.

On the appellant's contention that the Minister for Labour failed to comply with sections 20, 21 (1) and item 1 (h) of the Security of

Employment Act, Cap 387 R. E. 2002, we are of the settled mind that since the charges laid on the dismissed employee are not on the record, and more importantly the enquiry proceedings which prescribed his dismissal summarily, the learned judge rightly dismissed the suit because there was no evidence to prove, on the balance of probabilities, that the employee had neglected or failed to comply with instructions relating to safety or welfare to justify the infliction of summary dismissal. It would appear to us that the wrong of driving into the under ground mine without a valid licence and without the authority of the employer would fall under item 1 (f) of the Second Schedule to the Security of Employment Act, Cap 387 which states;

"The second Schedule

(sections 20 and 21)

The Disciplinary Code

> *"Item 1 to (f) fails to comply with the employer's instructions relating to work; including those designed to increase efficiency or output.*
> *1st Breach – Reprimand*
> *2nd Breach – Severe Reprimand*
> *3rd Breach – Fine*
> *4th Breach – Summary dismissed'.*

By driving from the surface to the underground mine without authority and, or valid driving license, the employee breached item 1 (f) of the Security of Employment Act, Cap 387. In that situation, he would be liable to summary dismissal on a fourth breach. In this regard, the decision of the High Court is correct in that the Minister rightly declined to support the summary dismissal, albeit for a different reason.

Counsel for the appellant insisted that the employee was dismissed for breaching item 1 (h) and item 14. 1 of the Policy for Vehicles at the Barrick Mines as shown on annexture F. However, the Policy on annexture F is not part of the provisions of the Security of Employment Act, Cap 387. Such Policy should be supported by regulations or by laws which can be enforced legally in the event of breach.

Under the circumstances, we are satisfied that the learned judge rightly dismissed the suit.

We accordingly dismiss the appeal with costs.

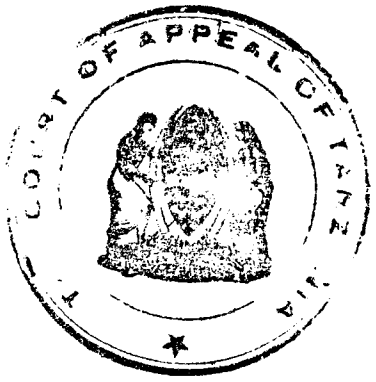
DATED at **TABORA** this 24th day of May, 2012.

E. N. MUNUO
JUSTICE OF APPEAL

N. P. KIMARO
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

I certify that this is a true copy of the original.



(Z. A. Maruma)
DEPUTY REGISTRAR
COURT OF APPEAL