IN THE COURT OF APPEAL OF TANZANIA

AT IRINGA

(CORAM: NDIKA, J.A., WAMBALI, J.A., And SEHEL, J.A.)

CIVIL APPEAL NO. 152 OF 2019

JIMSON SECURITY SERVICE .... APPELLANT

VERSUS

JOSEPH MDEGELA .... RESPONDENT

(Appeal from the Ruling and Order of the High Court of Tanzania, Labour Division at Iringa)

(Matogolo, J.)

dated the 18th day of October, 2018

in

Labour Revision No. 3 of 2017

....

JUDGMENT OF THE COURT

4th & 6th May, 2021

NDIKA, J.A.:

Central to this appeal is the sum of TZS. 3,500,000.00 awarded by the Commission for Mediation and Arbitration ("CMA") and affirmed by the High Court of Tanzania, Labour Division at Iringa for unfair termination of employment. It raises a somewhat simple issue: whether that award is justifiable and maintainable.

The appeal arises as follows. The appellant, Jimson Security Service, employed the respondent, Joseph Mdegela, as a Security Supervisor on an indefinite contract of employment commencing 1st August, 2015 at a monthly salary of TZS. 250,000.00. On 4th July, 2016, the appellant terminated the

respondent's employment on the ground of prolonged absenteeism. Dissatisfied, the respondent instituted on 3rd August, 2016 a claim of unfair termination against the appellant in the CMA. The matter hinged on two issues: first, whether there was a valid reason for the termination; and secondly, whether the employment was terminated in accordance with a fair procedure.

In her award dated 3rd February, 2017, the CMA's arbitrator acknowledged that the respondent was absent from his work station between 5th May, 2016 and 20th June, 2016 but that his explanation that he was sick was unduly rejected by the appellant's disciplinary committee mainly because his set of supporting medical documents was not received and considered. She found that although the respondent was served with notice to appear before the disciplinary committee, he was not served by the appellant with any formal charge containing the allegations against him for him to prepare his defence. This was a violation of Rule 13 (2) of the Employment and Labour Relations (Code of Good Conduct) Rules, 2007, Government Notice No. 42 of 2007 ("the Rules"). Besides, the arbitrator took the view that since the offence allegedly committed by the respondent would have been his first transgression the appellant had to establish that the said indiscretion was a serious misconduct rendering continued employment relationship intolerable in terms of Rule 12

(2) of the Rules. The appellant, it was found, failed to prove that fact. On that basis, the arbitrator answered the first issue in the negative.

Coming to the second issue, the arbitrator held that the termination was procedurally unfair. This finding was anchored on two grounds: first, that the disciplinary committee before which the respondent appeared for hearing was chaired by DW2 Charles Wambura, who, being a security guard employed by the appellant, was of an inferior rank to the respondent. This was a violation of Rule 13 (4) of the Rules requiring such a committee to be chaired by a sufficiently senior management representative who must not have been involved in the circumstances giving rise to the dispute. Secondly, that upon the decision of terminating the respondent's employment being made, he was not reminded of his right to refer the matter to the relevant appellate authority or the CMA in terms of Rule 13 (10) of the Rules. In the end, the arbitrator awarded the respondent a total of TZS. 3,500,000.00 being remuneration for twelve months (TZS. 3,000,000.00); one month's salary as payment in lieu of notice (TZS. 250,000.00); and one month's salary for his earned annual leave for year 2015/16 (TZS. 250,000.00).

Resenting the above outcome, the appellant applied to the High Court of Tanzania, Labour Division at Iringa seeking revision of the award on seven grounds. In its decision dated 18th October, 2018, the High Court (Matogolo,

J.) upheld the CMA's findings and dismissed the application. In particular, the learned Judge expressed that the respondent had furnished a good explanation for his absence from duty and that his termination from employment was procedurally unfair, not least because he was not served with any formal charge prior to his appearance for hearing before the disciplinary committee. Still aggrieved, the appellant has appealed to this Court on four grounds, which we paraphrase as follows:

1. That the learned High Court Judge erred in law in holding that there was no formal charge served on the respondent.
2. That the learned High Court Judge erred in fact in holding that the respondent had a good reason for his absence from work for more than five days.
3. That the learned High Court Judge erred in law in holding that the respondent's employment was terminated without following proper procedure.
4. That the proceedings before the CMA were a nullity as the respondent sued a non-existing person.

For the appellant, Mr. Evans Robson Nzowa, learned counsel appeared to prosecute the appeal. Mr. Frank Francis Mwela, learned counsel for the respondent, sturdily resisted the appeal.

In his oral argument before us, Mr. Nzowa primarily predicated the appeal on the four grounds as he argued them in the written submissions he had filed. On reflection, he appreciated the apparent despondency of the first, third and fourth grounds of grievance and urged us to mark them abandoned. Left with only the second ground, Mr. Nzowa pursued it relentlessly, contending that the High Court erred in finding that the respondent had a good reason for his absence from work for more than five days. When we queried him whether the said ground, if allowed, on its own could be dispositive of the appeal, the learned counsel maintained that the High Court erred on that aspect and urged us to allow the appeal.

In his oral argument in reply, Mr. Mwela referred us to pages 181 to 183 of the record of appeal, contending that there was cogent proof by the respondent that his absence from work was an enforced one; that he was attending medical treatment. He added that in terms of section 37 (2) of the Employment and Labour Relations Act, Cap. 366 R.E. 2019 ("the ELRA"), the onus was on the appellant to prove that there was a valid cause for the termination. The appellant, he argued, adduced no proof of that fact. In the premises, he urged us to dismiss the appeal.

We have keenly examined the record of appeal and taken account of the contending submissions of the parties on the sole ground of appeal on record.

The sticking question is rather narrow: whether the learned Judge erred in fact holding that the respondent had a good reason for his absence from work for more than five days.

To begin with, we wish to express our agreement with Mr. Mwela's submission that it was the appellant's burden to prove that there was a valid cause for the assailed termination. This is in consonance with section 37 (2) of the ELRA, which stipulates thus:

> *"37.-(1) It shall be unlawful for an employer to terminate the employment of an employee unfairly.*
>
> *(2) **A termination of employment by an employer is unfair if the employer fails to prove-***
>
> *(a) **that the reason for the termination is valid;***
>
> *(b) that the reason is a fair reason-*
>
> *(i) related to the employee's conduct, capacity or compatibility; or*
>
> *(ii) based on the operational requirements of the employer, and*
>
> *(c) that the employment was terminated in accordance with a fair procedure."*
>
> [Emphasis added]

As it was common ground that the respondent was absent from work for fifteen days, the appellant had to establish at the CMA, among others, that his absence was without any good cause and that the alleged offence being the

respondent's first transgression was so serious that it attracted termination of his employment.

It was in the evidence of the appellant's two witnesses (DW1 Mr. Juram Philip and DW2 Mr. Charles Wambura) that before the committee the respondent did not produce any medical documents to bolster his claim that his absence was enforced; that he was attending treatment during his absence from work. The respondent admitted to have not proffered his set of medical documents to the committee for its consideration but attributed that situation to the appellant's failure to serve him with a formal charge so that he could have prepared himself for the hearing.

Taking a hard look at the facts of the case and the evaluation of the evidence by the arbitrator and the learned Judge, we are of the firm opinion that the respondent is not to blame for not presenting to the committee his supporting documentary exhibits to bolster his side of the story that his non-appearance at work was an enforced absence. It is undoubted that the disciplinary proceedings against him were a flawed process even before they commenced; for the respondent was not served with any formal charge detailing the allegations levelled against him. As a consequence, when he appeared at the hearing he was unprepared to present an effective defence and so, he could not proffer supporting documentary proof. The committee,

therefore, decided the matter without the benefit of looking at the respondent's set of medical documents. In the premises, we think that the learned Judge was justified to find, as revealed at page 37 of the record of appeal, that:

> *"Although it was established that the respondent was absent from duty for such a prolonged period but it was not without reason. The reason was sickness. But the disciplinary committee based its decision on that reason of absence from duty, ... in my opinion, good explanation was given by the respondent."*

The failure to serve any formal charge on the respondent was an egregious violation of Rule 13 (2) of the Rules. Actually, it was clearly the watershed of the alarming shortcomings that followed. It drew the rebuke of the learned Judge as he endorsed the arbitrator's finding, at the same page 37, that:

> *"... as was correctly pointed out by the arbitrator, there was no formal complaint/accusation served [on] the respondent before he appeared before the disciplinary committee, even the letter summoning him to attend does not disclose the accusation he was required to answer.* ***This, therefore, is unprocedurai because the respondent was not informed of the accusation against him [beforehand]. He was therefore taken by surprise which is against***

natural justice. This was against the law."
[Emphasis added]

In the premises, we hold, without any hesitation, that the learned High Court Judge's finding that the respondent had a prima facie good explanation for his absence from duty for more than five days was based upon a sound and proper analysis of the evidence on record. That said, the sole ground of appeal fails.

In conclusion, we find the appeal lacking in merit. It stands dismissed in its entirety. This being a labour matter, we make no order as to costs.

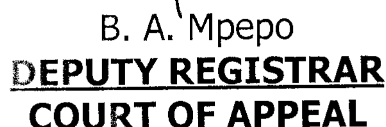
DATED at **IRINGA** this 6th day of May, 2021

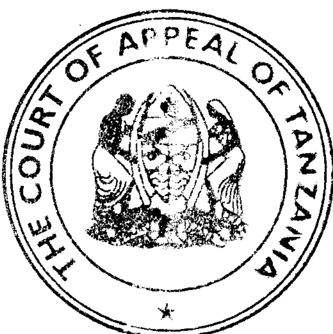
G. A. M. NDIKA
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

The judgment delivered this 6th day of May, 2021 in the presence of the Mr. Tenda Michael Mduge, Security Supervisor/Representative for the Appellant and Mr. Frank Mwela, counsel for the respondent is hereby certified as a true copy of the original.





B. A. Mpepo
DEPUTY REGISTRAR
COURT OF APPEAL