IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA
(CORAM: NDIKA, J.A, SEHEL, J.A., And KENTE, J.A.)
CIVIL APPEAL NO. 244 OF 2020

DEW DROP CO. LTD..... APPELLANT

VERSUS

IBRAHIM SIMWANZA..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania (Labour Division) at Sumbawanga)

(Mashauri, J.)

dated 2nd day of December, 2019

in

Revision No. 2 of 2019

.....

JUDGMENT OF THE COURT

22nd & 27th September, 2021

SEHEL, J.A.:

This is an appeal against the decision of the High Court (Labour Division) in Revision No. 2 of 2019 that affirmed the Award of the Commission for Mediation and Arbitration (CMA) in a Labour Dispute No. CMA/RK/38/2018 (the labour dispute).

The brief facts leading to the present appeal are such that: - the respondent was employed by the appellant, Dew Drop Co. Ltd to a position of a driver from 1st January, 2017 until his termination on 24th April, 2018

over allegations of gross dishonesty as by virtue of his position, he was entrusted with TZS. 380,000.00 being money he received from distributing mineral water but did not remit it to the cashier. Aggrieved by such termination, he filed a complaint before the CMA alleging that he was unfairly terminated from employment and sought to be paid a month's salary in lieu of notice of termination at TZS. 280,000.00, unpaid salary at TZS. 280,000.00, arrears of salary TZS. 1,680,000.00, severance allowance in the sum of TZS. 70,600.00 and compensation of TZS. 3,360,000.00 for unlawful termination. He also sought to be issued with a certificate of service and terminal benefits.

After hearing the evidence from both parties, the CMA found that the termination was substantially and procedurally unfair. It thus awarded him the following reliefs: -

1. Payment of unpaid salaries TZS. 280,000.00
2. Payment of one month salary in lieu of notice TZS. 280,000.00
3. Severance allowance of TZS. 70,000.00,
4. Certificate of service,

5. Compensation of 12 months' salaries for unfair termination TZS. 3,360,000.00,

6. Payment of 20 months' contractual salaries for the breach of the contract, and

7. Compensation of at least 10% as inflation rate for the whole amount due for payment from the date it was due.

Dissatisfied with the award, the appellant filed an application for revision in the High Court of Tanzania, Labour Division at Sumbawanga (the High Court). After hearing the parties, the High Court concurred with the arbitrator that the termination of employment of the respondent was substantially unfair because there was no proof of any criminal charge preferred against the respondent and on the procedure for termination, it found that the procedure was not followed because there was no proof that the respondent was not served with summons to show cause before the disciplinary committee. Nor was there evidence to show that a charge sheet was served on the respondent. The High Court further found that the minutes of the ethics committee were fabricated because the respondent did not sign it. Accordingly, the High Court dismissed the application. Still aggrieved, the appellant filed the present appeal.

In its memorandum of appeal, the appellant listed the following four grounds: -

1. That, the learned judge erred in law and fact in holding that the criminal proceedings must be instituted and charges proved before termination of the employee's employment.

2. That, the learned judge erred in law and fact in holding that, the respondent was unfairly terminated from his employment.

3. That, the learned judge erred in law in upholding the CMA award which awarded the respondent payment of TZS. 5,600,000.00 equivalent to 20 months salaries contrary to the law.

4. That, the learned judge erred in law in upholding the CMA award which awarded the respondent payment of compensation of 10 percent of decretal sum as the inflation rate contrary to the law.

At the hearing of the appeal, the appellant was represented by Mr. Kamru Habib, learned advocate whereas the respondent appeared in person, unrepresented.

In his submission, Mr. Habib was very brief, focused and straight to the point. Starting with the first ground of appeal, Mr. Habib faulted the learned judge in holding that the termination of the respondent was unfair because there was no any criminal charge against the respondent. He also submitted that the learned judge erred by holding that the charge was not proved beyond reasonable doubt. It was his submission that the law does not require an employer to prove criminality on part of the employee. He said, pursuant to section 37 of the Employment and Labour Relations Act, Cap. 366 R.E. 2019 (the ELRA) an employer has to prove two issues. One, he has to prove that there is valid and fair reason to terminate an employee, and two, that the procedure for termination was followed.

For the second ground of appeal, Mr. Habib argued that had the High Court considered section 37 of the ELRA, he would not have held that the respondent was unfairly terminated.

For the third and fourth grounds of appeal which Mr. Habib argued together, he submitted that the reliefs awarded to the respondent by the CMA are not provided under section 40 of ELRA. Nor were they pleaded by the respondent in his Form No.1. He added that it was wrong for the CMA to award the respondent 20 months' contractual salaries and 10% inflation

rate because it was a double payment. In support of his contention, he referred us to our decision in the case of **Felician Rutwaza v. World Vision Tanzania**, Criminal Appeal No. 213 of 2019 (unreported).

The respondent, being a layperson, did not have much to respond. He simply made a general reply to all four grounds of appeal that the Court should not disturb the concurrent findings of the two lower courts. With that reply, Mr. Habib did not have any rejoinder.

From the submission made by the learned counsel for the appellant and the reply by the respondent, we find that there are only two main issues for our determination. The first issue arose from the first and second grounds of appeal, that is, whether the respondent's termination was fair. And the second issue arose from grounds three and four, that is, whether the reliefs awarded were pleaded by the respondent.

We shall start with the first issue where the learned counsel for the appellant faults the findings of the High Court that the termination of the respondent was unfair. As correctly submitted by Mr. Habib, section 37 (2) of ELRA requires an employer to prove that the termination was substantially and procedurally fair. For ease of reference, we reproduce hereunder section 37 (2) of ELRA that reads:

"(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."

From the above provision of the law, the burden of proof is placed upon the employer to prove that there was valid and fair reason to terminate the employee and the due process in terminating such an employee was observed. In that regard, we are satisfied that the holding by the High Court was based on a wrong premise. It was wrong for the High Court to hold that since there was no criminal charge preferred against the respondent and that the criminal liability was not proven beyond reasonable doubt, the termination was unfair. The High Court ought to have directed its mind on whether there was valid and fair reason

for termination and whether the procedure for termination was complied by the appellant and not on the criminal liability.

On our part, we have revisited the record of appeal particularly the CMA's proceedings and observed from the respondent's letter of termination that he was terminated on the ground of gross dishonesty for the money entrusted to him as a driver. In terms of section 37 (2) of the ELRA, the appellant had the burden to prove that the respondent committed that offence of gross dishonesty and the procedure of his termination was adhered to the letter. In trying to prove that there was valid and fair reason, the appellant called Mohamed Salum Arfi (DW5), a company manager who told the CMA that the respondent was employed as a driver of the company and among his responsibilities were to deliver and sell water to customers. Mery Moshi (DW1), a sales officer of the appellant's company told the CMA that on 9th April, 2018 she gave the respondent 100 cartons of mineral water valued at TZS. 380,000.00 to deliver to Kwela (a customer) which he did deliver but he did not remit the proceeds of such sale to the cashier. Rose Malele (DW4), a cashier at the appellant's company confirmed to the CMA that on 10th April, 2018 the respondent was supposed to give her the proceeds of sale of 100 cartons

of mineral water but he did not. In his evidence, the respondent did not rebut the evidence adduced by the appellant's witnesses that he was given 100 cartoons of mineral water to deliver to Kwela. Given the evidence on record, we are satisfied that in terms of section 37 (2) (b) (i) and (ii) of the ELRA, there was a valid and fair reason to terminate the appellant. The reason being gross dishonesty.

Turning to the issue of whether the procedure was fair, this should not detain us much because after we have revisited the record of appeal, we failed to see any evidence suggesting that the respondent was formally charged. Failure to serve him with a formal charge was a gross violation of Rule 13 (2) of the Employment and Labour Relations (Code of Good Conduct) Rules, 2007, Government Notice No. 42 of 2007 hence making the termination of the respondent procedurally unfair (see the case of **Jimson Security Service v. Joseph Mdegele**, Civil Appeal No. 152 of 2019 (unreported)). Since the procedure in terminating the respondent was flawed, we find that the termination of the respondent was unfair. Accordingly, we find that the first and second grounds of appeal do not have merit.

Next for our consideration are the reliefs awarded to the respondent. From the outset we wish to state that the appellant did not have any issue with the payment of unpaid salaries of TZS. 280,000.00, one month's salary in lieu of notice TZS. 280,000.00, severance allowance TZS. 70,000.00, and compensation of 12 month's salaries for unfair termination TZS. 3,360,000.00. We shall thus not disturb these reliefs as we are satisfied that they were awarded in accordance with section 40 (1) of the ELRA.

The appellant is challenging the award of 20 months contractual salaries and 10% inflation rate. Mr. Habib submitted that these remedies are not among the remedies provided under section 40 (1) of the ELRA and that they were not pleaded and claimed by the respondent. We entirely agree with him because we have earlier on shown the reliefs which the respondent sought to be awarded. Unfortunately, as rightly submitted by the learned counsel for the appellant, the respondent did not seek for payment of these two reliefs in his Form No. 1 which is found at pages 7-13 of the record of appeal. Form No. 1 is a document which institutes a labour dispute and it is filed in terms of Rule 5 (1) of the Labour Institutions (Mediation and Arbitration) Rules, 2004, Government Notice

No. 64 of 2007. The Court in the case of **Security Group (T) Ltd v. Samson Yakobo and 10 Others**, Civil Appeal No. 76 of 2016 (unreported)) interpreted Form No. 1 to be synonymous to a plaint. The respondent was supposed to list down in his Form No. 1 all the reliefs which he sought to be awarded by the CMA. It is trite law that, as a general rule, reliefs not founded on the pleadings and which are not incidental to the specific main prayers sought in the plaint should not be awarded (see the case of **Kombo Hamis Hassan v. Paras Keyoulous Angelo**, Civil Appeal No. 14 of 2008 (unreported)).

Since, the respondent did not claim in his Form No. 1 for payment of 20 months' contractual salaries and 10% inflation rate and since they are not incidental to the specific prayer for unfair termination, we are constrained to set them aside. Furthermore, we find that the award of 12 months' salaries and 20 months' contractual salaries was a double payment as we held in the case of **Felician Rutwaza v. World Vision Tanzania** (supra). Accordingly, we find that the third and fourth grounds of appeal have merit.

In the end, the appeal is partly allowed to the extent shown herein. We therefore set aside the award of 20 months' contractual salaries and

10% inflation rate. Other reliefs awarded by the CMA and confirmed by the High Court are left undisturbed because we are satisfied that the respondent was unfairly terminated. We make no order as to costs because the appeal arose from a labour dispute.

Order accordingly.

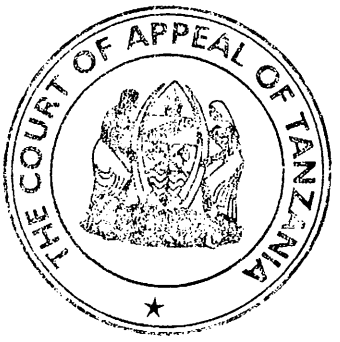
DATED at **MBEYA** this 27th day of September, 2021.

G. A. M. NDIKA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The Judgment delivered on this 27th day September, 2021, in the presence of Mr. Felix Kapinga, learned advocate for the appellant and the Respondent in person is hereby certified as a true copy of the original.



H. P. NDESAMBURO
DEPUTY REGISTRAR
COURT OF APPEAL