IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: NDIKA, J.A., KOROSSO, J.A. And KIHWELO, J.A.)

CIVIL APPEAL NO. 54 OF 2020

ALLY FARAHANI ..... APPELLANT

VERSUS

GEITA GOLD MINING LIMITED ..... RESPONDENT

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

(Rumanyika, J.)

dated the 31st day of July, 2019
in
Labour Revision No. 67 of 2018

.....

JUDGMENT OF THE COURT

03rd & 5th May, 2023

KOROSSO, J.A.:

On 24/11/2016, Ally Farahani, the appellant herein, lodged a complaint against Geita Gold Mining Limited, the respondent, before the Commission for Mediation and Arbitration (CMA) at Mwanza, Reference No. CMA/MZ/GEIT/1040/2016, pertaining to a labour dispute. He claimed 65 months remuneration as compensation for unfair termination as well as payments of statutory terminal benefits.

The brief background giving rise to the appeal before us is that the appellant was employed by the respondent as a security guard on 30/01/2006 on terms and Conditions of Service of employment prescribed by the respondent's condition of service, found in the Disciplinary Policy

and Procedures as amended from time to time (the code) and any other directives or instructions issued by the respondent's Management. The appellant's contract was terminated on 17/10/2016 for absenteeism. It transpired that before the said development, on 13/09/2013, the appellant was suspended from employment on full pay for fourteen days pending investigations into allegations of breaching the respondent's disciplinary code. While still under suspension, the appellant was amongst those who faced criminal charges in Criminal Case No. 401 of 2013, **Republic v. Hamud Bihemo and 8 others.**

To be noted that on 23/09/2015, when the appellant's suspension was still active, the criminal charges against the appellant were withdrawn and he and fellow accused persons were discharged. Unaware of the said developments, the respondent continued to pay him his monthly salary. Sometime in April 2016, the respondent received information of the withdrawal of the criminal charges, and that the appellant was working with Geita Town Council. The respondent proceeded to suspend payment to the appellant of the salary for the month of April 2016. Upon this development, the appellant knocked on the doors of the respondent's office to follow up on the suspended salary. On 3/5/2016, the respondent wrote a letter to the appellant and Geita Town Council to inquire about the status of the appellant's criminal case and employment status with

Geita Town Council. Upon being satisfied that the appellant was discharged of criminal charges he faced on 23/9/2015 and that he was working with Geita Town Council during the period, the respondent initiated disciplinary proceedings against the appellant, culminating with his termination from employment.

The appellant denied being absent from work from the date his criminal charges were withdrawn, stating that he could not report back to the office because his suspension had not been lifted at the time and that he was waiting to be called to resume office duties because on the day he was suspended he was directed by the Management not to enter his employer's premises. He also denied being employed by Geita Town Council during the period he was still under the respondent's employment, contending that he was only doing part-time work there to supplement his income. He denied being absent from his employment to warrant the termination. According to the appellant, the procedures for termination were not complied with and the reasons advanced for his termination were unjustifiable and unfounded in law considering the respondent's failure to furnish him with the disciplinary hearing proceedings.

At the CMA, after having heard both sides, its decision favoured the appellant, finding that the appellant's termination was unfair, ordering immediate reinstatement and payment of accrued remuneration and

dues. The respondent was dissatisfied and applied for revision before the High Court in Labour Revision No. 67 of 2018 (Rumanyika, J. as he then was) and was successful, hence the instant appeal lodged by the aggrieved appellant.

The appeal before us has been filed by way of a memorandum of appeal premised on five grounds of appeal which for reasons to be shown shortly, we shall not reproduce. It transpired that when the appeal came for hearing before us, Mr. Erick Martin Mutta, learned counsel, who represented the appellant, who was also present in Court, onset, sought and was granted leave to withdraw the fourth ground of appeal found in the memorandum of appeal. Upon further scrutiny of the grounds of appeal, he submitted that essentially the remaining grounds of appeal were centered on faulting the High Court's finding that the respondent's termination of the appellant from employment was fair and justifiable on the following aspects: One, for not considering the issues raised by the appellant in the Revision proceedings. Two, shifting the burden of proof on unfair termination from the employee to the appellant and thus contravening section 39 of the Employment and Labour Relations Act, Cap 366 (the ELRA). Three, failure to comply with disciplinary procedures as provided under the provision of Part II of Employment and Labour Relations (Code of Good Practice) Rules, GN No. 42 of 2007 (Code of Good

Practice) together with Guidelines for Disciplinary, incapacity and incompatibility policy and procedure (Guidelines, policy and procedure); and Four, failure to properly interpret the law relating to disciplinary measures to be taken upon absenteeism of an employee.

On the respondent's side, Mr. Gregory Lugaila, learned counsel who represented the respondent, had no objection to matters for consideration in the appeal as drawn from the grounds of appeal.

To be noted is the fact that, earlier on the learned counsel for both parties had filed their respective written submissions for and against the appeal respectively pursuant to Rule 106(1) and (8) of the Tanzania Court of Appeal Rules, 2009 (the Rules). At the hearing, each learned counsel was provided an opportunity to give oral submissions before us on the matters for determination drawn from the grounds of appeal. When considering their arguments for and against the appeal before us, we will take account of the written and oral submissions from the learned counsel for the contending parties.

In expounding the appeal, Mr. Mutta argued that the High Court erred in holding that the appellant's termination was fair and justifiable and, in the process, shifted the burden of proof to the appellant contrary to the law. The appellant's counsel argued that in proving the case of unfair termination, it is incumbent upon the employer to demonstrate that

termination is fair in terms of section 39 of ELRA. The learned counsel contended further that at all stages from the CMA to the High Court, the appellant did fully explain allegations of absenteeism from the place of employment. He maintained that what should be considered is the fact that at the time, the appellant was formally suspended pending ongoing investigations. A suspension that also included specific conditions/instructions to which the appellant was expected to comply, including not appearing at the work premises. He argued that the High Court should have considered the fact that the initial 14 days suspension was later extended by way of oral communication with the expectation that the conditions meted with the suspension to be operational up to the conclusion of pending investigations. According to the appellant's counsel, up to the time of receiving the letter of termination, the appellant was yet to get any communication from the employer to end the suspension contrary to Rule 27(4) of the Code of Good Practice. Mr. Mutta argued further that the act by the High Court to shift the burden of proof to the appellant was a serious omission. He also queried the argument that the whereabouts of the appellant were unknown, stating that if so, why did the respondent continue to pay him if that was the case?

Amplifying the issue of the respondent's failure to comply with laid down procedures as provided by Part II of Code of Good Practice and the

Guidelines for Disciplinary Incapacity and Incompatibility Policy and Procedure, he argued that the High Court Judge failed to consider the anomalies in the procedure applied by the respondent in terminating the appellant. He reasoned that the fact that the High Court Judge held that the termination was justifiable under the circumstances while the law was not followed, was faulty.

The appellant's counsel further contended that the evidence gathered from the record of appeal found at pages 39 and 371 shows that the appellant was only absent for less than five days and referred us to the testimony of the respondent's Human Resources officer of the respondent (DW1) whose testimony was that the appellant was absent from 23/9/2015. He further contended that Rule 11(4) of the Code of Good Practice requires that for a person to be described as having done a misconduct of absenteeism, it should be for more than five days and not less. If it is less, the proper remedy is counseling and warning while Rule 12(2) of the Code of Good Practice provides that a first offence of an employee shall not justify termination unless it is proved that the misconduct is so serious that it makes a continued employment relationship intolerable. He concluded by imploring us to find the appeal meritorious and allow it.

Mr. Lugaila commenced his submission by adopting the written submission filed for the respondent. On the issue of failure of the High Court judge to address all the issues raised by the appellant that challenged his termination, the respondent's counsel submitted that this argument is misconceived since all the issues before the High Court were sufficiently dealt with conjointly. He contended that in his deliberations, the High Court judge condensed all the issues raised to draw one major issue. He argued that this can be discerned from the Judgment itself referring us to page 272 of the record of appeal and the High Court's consideration of whether there were reasons for the termination of the appellant's employment contract. In considering this issue, he argued, the High Court took into account the fact that the appellant did not report back to work upon withdrawal of his criminal charges on 23/9/2015 and waited until 2/5/2016 to report to his office, together with the fact that during this period the appellant continued to receive a full salary without working.

Regarding claims that the High Court shifted the burden of proof to the appellant on the issue of whether the appellant's termination was fair, he considered this to be misguided, arguing that the High Court only sought the appellant to prove to have reasonable grounds about his absence from work due and nothing else. He reasoned that this was done

after the respondent discharged her duty under section 39 of ELRA by proving the appellant's absence from work without reason. That the High Court did not find any good reason provided by the appellant for not reporting to work immediately after being discharged from the criminal charges which confronted him and thus found that the appellant did not act prudently and was therefore absent from his place of work without plausible reasons.

With respect to the issue of whether the appellant's termination was procedurally and substantively fair, he contended that the record of appeal bears evidence that the respondent did follow all the requisite procedures to terminate the appellant's employment. According to the respondent's counsel; First, the appellant was charged accordingly (exhibit D6), and second, was notified about the hearing of the case and given ample time to prepare himself (exhibit D1). Third, the appellant's case was heard, and he was given an opportunity to cross-examine the witnesses before the Disciplinary Committee (exhibit D2). Fourth, his right to appeal was explained to him.

He argued further that apart from what has been displayed, the appellant was conversant with the case and this fact is derived from the fact that the appellant appealed to the Managing Director (exhibit D4) although his appeal was unsuccessful and thereafter, his employment was

terminated and was given his dues (exhibit D5), in compliance of Rule 15 of the Code of Good Practice. The learned counsel for the respondent asserted that the appellant was absent from his workstation for more than five days which under the law, in the absence of a reasonable explanation entitles the employer the right to terminate the employment contract upon affording the wrongdoer the right to respond to accusations, which was done.

On claims that the appellant had committed his first offence and thus he should have been warned only, Mr. Lugaila, countered that each day of absenteeism amounts to an offence and the number of days he was absent from work clearly amounts to a serious misconduct. He concluded by urging the Court to dismiss the appeal for want of merit.

The rejoinder from the appellant's counsel was brief essentially to reiterate his earlier submission in chief and for the prayers sought to be granted.

Having heard the learned counsel for the contending parties and gone through the record of appeal and the cited authorities, we find that the main issue of contention is whether the termination of employment of the appellant by the respondent was procedurally and substantively fair. Certainly, this has been the issue from the inception of the complaint at the CMA and in the High Court. We thus concur with the High Court Judge

that in the instant appeal, it is the main issue for determination and sufficient to dispose of the appeal.

We find that our first task is to recapitulate the position of the law, on who is expected to prove whether the termination was fair. Section 39 of the ELRA addresses who has the burden to prove in unfair termination proceedings stating:

> *"S. 39- In any proceeding concerning unfair termination of an employee by an employer, the employer shall prove that the termination is fair."*

To discharge such burden, both counsel for the appellant and the respondent agreed that, the employer is the one required to prove that the employee was terminated for a valid and fair reason and upon a fair procedure. Thus, invariably, we shall determine whether the respondent duly expounded his duty to prove the same and while deliberating on this the provision of section 37 of ELRA is also relevant. It reads:

> *"S. 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

(c) that the employment was terminated in accordance with a fair procedure."

Our scrutiny of the evidence adduced at the CMA has shown us that the respondent adduced evidence to the effect that the appellant was absent from his employment from 23/9/2015, the day the criminal charges he faced were withdrawn up to 2/5/2016 when he reported for work to query on why his salary was withheld. There were various exhibits tendered by the respondent to prove his assertion, these included notification of charges of the appellant's absence on 23/9/2015 (exhibit D1) and a letter to the appellant asking him why he failed to report to work as of the date his criminal case was withdrawn (exhibits D6 and D7); the appellant's reply letter (exhibit D8), the letter to Geita Town Council asking whether he worked there during the period (exhibit D9); and a letter from Geita Town Council stating that the appellant "worked there temporarily in 2015 as a casual labourer" (exhibit D10). There was also the evidence of Unice Mgole (DW1), the Senior Human Resources Officer who narrated the disciplinary procedure undertaken by the respondent upon charging the appellant with absenteeism.

The respondent was also expected to establish that the appellant's absence was without any good cause and it being a first transgression

that it was very serious to attract termination of his employment. Having perused the evidence on record, we are satisfied that the respondent adduced evidence that clearly showed the disciplinary process undertaken step by step as alluded to by the learned counsel for the respondent. The appellant was duly charged, appeared before a disciplinary committee, and given the opportunity to cross-examine witnesses, and his explanations were considered. Certainly, taking into account the evidence on record, we agree with the learned counsel for the respondent that the reasons advanced by the appellant failed to explain his absence at his place of work for such a long period. His argument that he was unable to report to work while under suspension does not augur well with his prompt follow-up to query the whereabouts of his salary for April 2016 after it was withheld.

There is also the fact that it was established by evidence that the appellant was working with Geita Town Council albeit on a part-time basis, while still recognized as an employee of the respondent and receiving full salary. This shows a serious disregard of his employment contract. Therefore, we are in line with the High Court Judge's findings that in the circumstances of this case, the appellant was expected to report to work on or immediately after 23/9/2015 when his criminal charges were withdrawn and failure to do so was a serious misconduct.

We have also considered the appellant's counsel's argument that the appellant had to wait for a copy of the decision before he reported back to the office, we firmly hold that the argument does not hold water. We have considered this in the context that if the appellant had relied on oral communication of suspension after the initial order for 14 days suspension had expired, it was extended through oral communication, then without a doubt even his report on being discharged from criminal charges could have been done orally. There was also no evidence that he attempted to report but was chased away or denied audience of any of his supervisors or responsible person.

There was another contention by the appellant that the evidence only showed that he was absent for one day on 23/9/2015 and referred us to the evidence of DW1, we are of the view that this argument is misconceived, because since it is the day when the criminal charges were withdrawn, that is why it was stated, but the disciplinary charges and the exhibits tendered, showed that the absence from work was from 23/9/2015 to 2/5/2016.

We are thus satisfied that the respondent discharged his duty to prove that the appellant was fairly terminated from employment by proving that the reasons for termination are valid and fair and they relate to the appellant's conduct and capacity and that there was a fair

procedure that ended up with the termination in compliance with section 37(2) of ELRA.

Based on the foregoing, we find no merit in the appeal. Since the appeal originates from a labour dispute, each party to bear its own costs.

DATED at **MWANZA** this 4th day of May, 2023.

G. A. M. NDIKA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The Judgment delivered this 5th day of May, 2023 in the presence of Mr. Bahati Kessy, learned Advocate holding brief for Mr. Erick Martin Mutta, learned Counsel for the Appellant and Mr. Gregory Lugaila, learned Counsel for the Respondent, is hereby certified as a true copy of the original.

A.L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL