IN THE HIGH COURT OF THE UNITED REPUBLIC

OF TANZANIA LABOUR COURT

AT DAR ES SALAAM

REVISION NO. 221 OF 2014

BETWEEN

KNIGHT SUPPORT.....APPLICANT

VERSUS

AHSANTE MAHUNDI.....RESPONDENT

JUDGMENT

20/04/2015 & 05/06/2015

Mipawa, J.

This revision application is brought under section 91 (a) (2) (a) (b) of the Employment and Labour Relations Act No. 6 of 2004[1] and Rules 24 (1) (2) (3) and 28 (1) (c) (d) and (e) of the Labour Court Rules[2]. The Applicant has also filed a chamber summons under the same section 91 (1) (a) (2) (a) and (b) of the Employment and Labour Relations Act[3]. Rule 24 (1) (2) (3) and 28 (1) (c) (d) (e) of the Labour Court Rules[4]. The application is supported by an affidavit of one Paschal Mayokolo[5].

This revision was heard ***viva voce*** (by live voice) and the Applicant in support of the application for revision submitted ***viva voce*** that,

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[1] Cap 366 RE 2009 Act No. 6 of 2004 [ELRA]

[2] Government Notice No. 106 of 2007 [GN. 2007] The Rules

[3] *op. cit* note 1

[4] *op. cit* note2

[5] The Human Resources Officer of the Applicant

adopting his affidavit, the arbitral award in CMA/DSM/557/09/228 the subject of this revision was improper because the CMA[6], erred in law and fact for not considering the evidence of the Applicant. That the Arbitrator failed completely to consider the evidence of the Applicant during the arbitration hearing in the CMA, that the Applicant brought witness who clearly explained that the Respondent was stopped to ride a motorbyce/motorcycle, by senior official and was told not to re-fuel. However inspite of that he secretly rode the motorcycle and reported at office on 8:00 am instead of 6:00 am. He used to hide the motorcycle at GAPCO Filling Station instead of the company's parking.

The Applicant further submitted that the Respondent was advised by a medical doctor not to ride the motorcycle. He was in that connection permitted to report at work on 8:00 am instead of 6:00 am. He used the motorcycle and reported at work on 6:00 without notifying the administration and hence company found that the Respondent was dishonest and had committed a misconduct as per his acts of failing to report at the office that he was recovering and could ride the motorcycle and therefore he started to report at 8:00 am instead of 6:00 am. Therefore it was wrong for him to report at 8:00 am. Instead of 6:00 am because he had recovered.

The appellant submitted that the CMA award was improperly procured because it was supposed to be issued on 06/12/2010 but the

[6] CMA refers to the Commission for Mediation and Arbitration established under S. 12 of the Labour Institution Act No. 7 of 2004 Cap 300

award shows that it was issued on 23/04/2010 almost one year which is contrary to section 88 (9) of the Employment and Labour Relations Act which requires the arbitrator to issue the award within thirty days (30). Rule 27 of Government Notice No. 67 of 2007[7] requires that the CMA award should be signed and reasons given.

In the instant case the judgment delivered more than one year and half, the Applicant prayed the CMA award to be quashed he referred to the case of **Dar es Salaam Yatch Club V. Eliezer Musama and James**[8], in which the award was delivered contrary to section 88 (9) of the ELRA[9]. Also the case of **Anthony Tamba V. Northern High Land Secondary School**[10], where the Court quashed the proceedings of the award for being procured contrary to section 88 (9) of the Employment and Labour Relations Act No. 6 of 2007.

Mr. Katerega submitted for the Respondent that the Respondent as a senior fire operation officer was supposed to be provided with a motorcycle as it were for the other employees. He argued that the Respondent suffered from backache "*maumivu ya mgongo*" and the doctor was of the opinion that the cause was his duties and hence advised that the Respondent be given light duties. He submitted further that it was the doctor who was supposed to give his final assessment if the motorcycle was causing the illness of the back and not for the employer to assess.

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[7] The Labour Institution [Mediation and Arbitration Guidelines] Rules, 2007 GN. 67/2007
[8] Labour Revision No. 263 of 2008 HCLD Dar es Salaam unreported
[9] Employment and Labour Relations Act *op. cit* note 1
[10] Labour Revision No. 274 of 2009 p. 3

That the employer was supposed to produce a medical certificate to show that the Respondent was not supposed to ride the motorcycle. The employer never did that before terminating the employee Respondent.

The Respondent's representative submitted further that the employer Applicant was supposed to give the employee Respondent an alternative means of transport as he was a senior fire officer. Hence riding of the motorcycle by the Respondent was for the benefit of the employer. On allegations that the employee Respondent was secretly riding the motorcycle, the Respondent's representative submitted that the allegations on fuel were false as it was an open act and fuel was provided by the employer applicant.

He concluded that the decision to terminate was not done by the disciplinary committee rather it was by the Chief Fire Manager, who overruled the disciplinary committee's decision which was to give a warning to the employee Respondent. The employee was also not served with a letter or charges telling him his offence. The officer intervened the procedure which was not right, he cited the case of **Kennedy Nyande V. TAZARA** CAT[11].

On the award the Respondent submitted that the resignation of the Arbitrator one Sehemba Esq. had caused the delay of the award. He also prayed that the Court do order the employer Applicant to pay the employee Respondent his salaries. He referred to the case of **Bidco Oil and Soap**

[11] Civil Appeal No. 1 of 1977 Court of Appeal of Tanzania CAT per Samatta, J.A.

Ltd. V. Robert Matonya and two others[12]. The case of **Jamana Printers V. Neema Mushi**[13].

In rejoinder the Applicant submitted that the Respondent was told not to ride a motorcycle by the doctor. There was however no medical certificate. The Respondent was riding the motorcycle secretly and parking it at a differed park from that used by office employees. On the disciplinary committee, he argued that the committee is not a final say, it just recommends.

After hearing the submissions of both parties it is important to comprehend what transpired in the Commission for Mediation and Arbitration. In a nutshell things were like this. The Respondent employee was employed by the Applicant employer styled Knight Support (T) Ltd. as a fire fighter in April, 2001. He was elevated to the post of Senior Fire Duty Officer/Training Officer and further more to the more senior post of senior fire operation officer and at the end of the day in the year 2009 may the Applicant terminated the employment of the Respondent employee for gross **misconduct and dishonesty**[14].

The Respondent employee had developed an illness on his spinal which upon examination at hospital of **sacrococcygeal** spine, it was found that there was no acute fracture on the same, however the doctors

[12] Revision No. 70 of 2009 HCLD Dar es Salaam at p. 10
[13] Revision No. 83 of 2013 HCLD Dar es Salaam at p. 5
[14] Commission for Mediation and Arbitration award at p. 1 and the Applicant's affidavit at paragraph 2. See also part I of the hearing from on summary of allegations against employee

comment were that the Respondent should avoid **motorcycle riding**[15]. The employee Respondent however after sometime was seen with the motorcycle using its and that he was not parking at office premises. The employer Applicant found that the employee using the motorcycle when he was prohibited to use by the employer and the doctor, charged him before the disciplinary hearing committee for gross misconduct and dishonest. However when cross examined, the Applicant's employer's witness one Rahma Nahad (DW^2) told the commission that the employee Respondent was terminated due to "*gross dishonest*"[16].

On the other hand the disciplinary hearing committee of the Applicant found that the employee Respondent was not guilty of dishonest, however it found that the employee Respondent had committed a **misconduct of lower degree** and it suggested for a final warning in lieu of termination, but the management revised and stated that:-

> *...Mr. Mahundi deceived management by not disclosing he was fit to ride his bike, thus still claiming permitted late for 2 weeks plus light duties. We find he should be terminated for gross misconduct and dishonest...*[17]

The employee Respondent though agreed that he was restrained from riding his motorcycle for sometime by the doctor he did so, because of transport problems at his place where he lives he started to use it lightly

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[15] Sick sheet No. 41289 DW1, Ref. OB/04/27/04/09 of 28/04/09 with Doctor's comment from Agakhan Hospital

[16] CMA Arbitration award *op. cit* note 14 at page 4

[17] See Knight Support hearing form Part III [employer] outcome of the Appeal. At Part I the committee hearing noted that the employer had been issuing fuel to the Respondent's motorcycle as for other motor bikes belonging to the company

so as to reach his working place on time[18]. That is how the record describes, the management also noted the use of the motorcycle by the employee but still it provided fuel to the motorcycle of the Respondent. Those were observation by the disciplinary hearing committee which later on found that the Respondent committee a misconduct of the lower grade and recommended for a penalty of final written warning which was however reversed by the employer Applicant as stated earlier and the Respondent employee received a sanction of termination.

The Learned Arbitrator in his decision found that the termination of the Respondent was unfair substantively and procedurally. It was substantively unfair because the offence committed or the misconduct was not serious enough to justify termination without a prior warning. That the employer was wrong to intervene or interfere with the decision of the disciplinary hearing committee which recommended or made a decision (?) that the Respondent should be given a written final warning.

The termination of the Applicant was not in accordance with the fair procedure because the Respondent employee was not given the charges prior to the hearing of the allegations by the disciplinary committee, that the management decision to overturn the disciplinary committee ruling was a violation of the procedure. The Arbitrator stated that:-

> *...Pamoja na kwamba mlalamikaji hakupatiwa taarifa ya kikao cha nidhamu wala kupatiwa mashitaka yake, bado hata kwa kile kikao [cha nidhamu] kiliamua*

[18] *op. cit* note 17 Applicant's hearing form Part I. The Disciplinary hearing committee did not see any incidence of poor performance as he was recently commended of good performance on duty

hakikufuatwa na ikiwa kikao cha nidhamu ndicho kilimsikiliza, uongozi kuja kujichukulia madarka yasiyo na ukomo na kumuachisha mlalamikaji bila kuzingatia kikao nimeona...ni ukiukwaji wa utaratibu hivyo hakuna utaratibu halali uliofuatwa katika kumwachisha kazi mlalamikaji...[19]

The arbitrator ordered the employer Applicant to pay the Respondent compensation of 12 months' salary, severance allowance, salary in lieu of notice because he was not given the notice of 28 days as per S. 44 of the Employment and Labour Relations Act No. 6 of 2004[20]. He ordered also to be given a certificate of service as per Section 44 (2) of the Act[21]. The amount payable to the employee Respondent was Tzs. 8,867,805/=.

Now on the foregoing three issues crop, which this Court has to decide, they are:-

(a) *Whether or not the Learned Arbitrator was right to hold that the Respondent employee was unfairly terminated substantively that is, there were no valid reason to terminate the Respondent employee.*

(b) *Whether or not the Learned Arbitrator was correct to hold that the employer did not follow the fair procedure before terminating the Respondent employee [procedural fairness].*

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[19] See the Commission for Mediation and Arbitration award at p. 6 Sehemba, Esq.

[20] S. 44 (1) (d) on termination of Employment, an employer shall pay an employee (a)...(b)...(c)...(d) any notice pay due under Section 51 (6) (e) ...(f) S. 41 (5) instead of giving an employee notice of termination on employer may pay the employee the remuneration the employee would have received if the employee had worked during the notice period

[21] S. 44 (2) on termination the employer shall issue to an employee a prescribed certificate of service

(c) *Whether the act of the employer to interfere with the disciplinary hearing committeé decision that the employee should be given a final written warning was a violation of fair procedure [Does the management have powers to overrule the disciplinary committee ruling?]*

It appears from the outset [in limine] that the Applicant employer, as the record shows found as a serious misconduct when the employee Respondent was seen using the motorcycle while he was forbidden by the doctor to ride the same. The employer noted it as a gross misconduct when he reversed the disciplinary committee's findings that the employee had committed a misconduct of lower grade and has to be warned with a final written warning. Seeing the act as a gross misconduct the employer passed the verdict thus:-

> *..Mr. Mahundi deceived management by not disclosing he was fit to ride his bike, thus still claiming permitted late for 2 weeks plus light duties. We find [that] he should be terminated for* ***gross misconduct***[22] *...*

I think in my view the employer was wrong to embark on such accusation to the employee Respondent, which gave birth to the "gross misconduct" because there was no proof that the employee Respondent was completely fit to ride the motorcycle. The decision by the employer Applicant that the employee was fit to ride the motorcycle was not backed by any medical proof from the Doctor was treated the employee

[22] *op. cit* note 17

Respondent. Therefore for the employer to conclude that the employee deceived the management for not disclosing that he was fit to ride the motorcycle and hence terminated him was by and large not a valid reason for termination as rightly found by the CMA - Commission for Mediation and Arbitration and the Disciplinary Committee.

In considering whether or not termination is an appropriate sanction for misconduct, there are various factors which have to be taken into consideration by the employer, arbitrator or Judge. They are:-

1. ***The gravity of the misconduct***

   Here the seriousness of the misconduct is an important element when the appropriateness of termination as a result of misconduct is considered as a sanction.

There are some aspects in considering the seriousness of the misconduct for example those which constitute serious breach of trust relationship between the employer and employee eg. theft, fraud and the like are more serious and aggravate the misconduct.

There are factors which pray the role in determining the **seriousness of the offence** and can be summarized as follows:-

(a) ***Circumstances surrounding the commission of the offence***

Here in the instant case the employee, as the record shows, for example was forced to ride his motorcycle because of the transport problem at the place he lives, he started to use the

motorcycle lightly so as to reach his working place on time. The act of the employer to continue issuing fuel to the motorcycle of the employee and the fact that the employer did not provide any alternative transport to the employee, who was an officer are circumstances to be considered in determining the seriousness of the offence.

Another factors that may be considered by the employer, Arbitrator or Judge in determining the seriousness of the offence or misconduct apart from the circumstances surrounding the Commission of the offence are:-

(b) **The nature of the work performed by the employee**

The employee for example in the instance case was a senior officer of the Applicant. The fact that he had no any alternative transport to reach him at his working place in time, the act of riding the motorcycle lightly so as to reach his place of work on time and not to be late as a senior officer was a matter to be considered.

Coming late for a senior employee at his place of work could be a bad impression especially to the junior employees and the employer at large. Senior employees had to lead others for adhering to the working rules and conditions.

(c) **The impact of the misconduct on the workforce [of the employer] as a whole**

The employee's conduct of riding the motorcycle lightly in order to reach his place of work on time had no negative impact on

the work force of the employer as a whole rather it was for the benefit of the employer as rightly pointed out by the Respondent's representative Mr. Katerega.

Misconduct which may have a negative impact on the work force of the employer as a whole are like theft of co-worker's property or theft of the employer's properties etc. Other factors include:-

(d) *The relationship between the employer and the employee.*

(e) *The ability of the employee to do the job.*

Dr. Emil Strydom[23], explained at lengthy the above factors in determining the seriousness of the misconduct and for the employer, Arbitrator or Judge in considering whether or not termination is an appropriate sanction, in his Article tilled, **dismissal for misconduct. The statutory requirements for a fair dismissal for misconduct**[24]. It is clear that the relationship between the employer and the employee was good as evidenced by promotions of the Respondent employee from a fire fighter to senior fire Duty Officer/Training and later to senior fire operation officer between 05/04/2001 to 04/05/2009. This indicated also that the ability of the employee to do the job was perfect. There was no indication of poor performance as noted also by the disciplinary committee that..."*records do not show [that] any incidence [sic] of poor performance*

[23] Dr. Emil Strydom; BA, LL.B (Pret) LL.M. LL.D [Unisa] is an Industrial Relations Manager at the chamber of mines of South Africa. She is an Attorney of the High Court. Assessor in the Labour Appeal Court cases South Africa. Editor and Co-Author of Essential Social Security Law [Juta and Co. 2001]

[24] Essential Labour Law [individual labour law] Vo: 3rd Ed. 2002 Houghton p. 184-187

P/S note. He recently got recommendation of good performance on duty. Refer Nairobi Training etc..."[25].

(f) ***The circumstances of the infringement itself [of the order, rule etc.]*** *is yet another factor to be considered by the Arbitrator, Judge and the employer in determining the* ***seriousness of the misconduct*** *and an appropriate sanction.*

The employee Respondent in the instant case had infringed the rule or order not to ride his motorcycle because of his back borne illness, until such time when he get well and fit to ride the same. The record shows the circumstances like transport problems at his place of work[26] and where he lives hence decided to lightly use the motorcycle in order to reach his place of work as a senior official of the Applicant therefore non availability of an alternative transport to ferry him to the place of work in time and the act of the employer to continue putting fuel in his motorcycle are the circumstances of the infringement of the order not to ride the motorcycle and the employer therefore could have considered them and issued a written warning to the Respondent employee as recommended by the disciplinary committee and not termination. Regard being had the

[25] *op. cit* note 17

[26] *op. cit* note 17 the Disciplinary Committee noted and decided that on riding the motorcycle and parking out of CB. The hearing panel see that as misconduct of lower grade

circumstances of the infringement. The second factor in considering the appropriate sanction for misconduct is:-

2. **The employee's circumstances**

The circumstances of the worker must be taken into account by the employer Arbitrator or Judge when considering whether termination is an appropriate sanction for a misconduct, by looking into some factors like:-

(i) ***The length of service***

I think the Respondent employee lengthy of service from 2001 to 2009 is long enough to operate in his favour [nine years].

(ii) ***The employee's previous disciplinary record***[27]

The employee Respondent had no record of disciplinary warning by the Applicant, this could have been considered by the employer Applicant especially where the misconduct like the one he committed was not of a serious nature, rather it was of lower grade as rightly found by the disciplinary committee and the Commission. However if a misconduct was of a serious nature a single previous warning may warrant termination. The Respondent had a good record of work.

(iii) **Personal circumstances of the employee**

The employer Arbitrator or Judge may take into consideration also the personal circumstances of the worker in determining the appropriate sanction. Here

[27] *op. cit* note23, 24

personal circumstances include, the marital status of the employee, the number of children and dependants.

On the foregone had the employer considered at lengthy and fairly on the committed misconduct by the employee, he could have obviously concurred with the decision or recommendation of his disciplinary committee that the offence or the misconduct committed by the Respondent employee was of the lowest grade ***c'est-a-dire*** [that is to say] not of serious nature to warrant termination. Hence as rightly found by the commission there were no valid reason advanced by the employer Applicant to terminate the employment of the Respondent employee.

In the second issue of procedural fairness, the record shows that the employer did not serve the employee Respondents with charges. Fairness of the procedure requires the employer to notify the employee with the allegations, as per Employment and Labour Relations Code of Good Practice Rules[28] [GN. 42 of 2007]. This was not done by the employer as found out by the learned arbitrator. It is not known also if the employee Respondent was given a reasonable time to prepare for the hearing [as the charges were not served to him] and to be assisted by a trade union representative or a fellow employee in the disciplinary hearing committee as per Rule 13 (3) of the Code of Good Practice[29]. The purpose of being represented is a major gear towards fairness of the procedure in the disciplinary hearing. The purpose of an employee being represented in the

[28] Employment and Labour Relations Code of Good Practice Rules, Government Notice No. 42 of 2007 Rule 13 (2)
[29] *op. cit* note 28

disciplinary hearing committee is of two fold as pointed out by Dr. Emil Strydom[30] in his Article **dismissal for misconduct. The statutory requirements for a fair dismissal for misconduct**[31] that:-

> *...The purpose of assistance is of two fold, **in the first instance** the trade union representative or fellow employee must assist the employee with the presentation of the response to the charge. **In the second instance**, the trade union representative or fellow employee must ensure that the procedure which is followed during the inquiry is fair. The representative must not merely accompany the employee to the enquiry but must play an active role during the enquiry...*[32]

Assistance to the employee by a trade union or a fellow employee during the hearing, is also stressed by the **International Labour Organization Recommendation on the Termination of Employment Convention No. 158 of 1982**[33].

Under paragraph 157 and 158 of the Report of the Committee of ILO experts on procedures relating to termination of employment states expressly that:-

> *157...Under paragraph 9 of the Recommendation a worker should be entitled to be assisted by another*

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[30] *op. cit* note 23
[31] *op. cit* note 24
[32] Dr. Emil Strydom *op. cit* note 23
[33] ILO protection against unjustified dismissal general survey on the termination of Employment Convention No. 158 and Recommendation No. 166 of 1982 at p. 87

person when defending himself, in accordance with Article 7 of the Termination of Employment Convention 1982, against allegations regarding his conduct or performance liable to result in the termination of his employment...

158...The worker has the right to be assisted by another person who is often a staff delegate or trade union representative, or who may be a person chosen by the worker from the staff of the enterprise, or an adviser from outside the enterprise...[34]

In the event and on the foregone I entirely and respectfully agree with the commission that the Respondent employee was unfairly terminated substantively and procedurally ***idest*** [i.e] [that is] there was no fair reason to terminate the Respondent employee and the employer Applicant failed to follow the fair procedure before terminating him. Worse still the employee was terminated while under Hospital or medical ex-perts surveillance following his illness. There was no proof that, he had recovered from the illness **but the Applicant employee terminated him on suspicion that he had cheated the employer on recovery of the illness.**

[34] *op. cit* note33 on the heading Assistance at p. 67 paragraphs 157 and 158 of the Report of the Committee of ILO experts

If I may be excused, at this point to quote Rycrofit and Jonathan in their book titled "A guide to South Africa Labour Law 2nd Ed. In order to cement my decision, regard being had the fact that our labour laws are in parimateria with South Africa Labour Law.

> ***...The employer's reason for dismissing an employee must be both valid and fair.*** *Validity it has been said "goes to proof and to the applicability to the particular employee of the reason for dismissal".* ***The enquiry is whether the facts on which the employer relied to justify dismissal*** *actually existed* ***...while a mere suspicious of misconduct is not sufficient to warrant dismissal...***[35] *[emphasis mine]*

I don't have any reasons to disturb the decision and award of the Learned Arbitrator in the Commission [CMA] below and thence I found that the revision application has no merits and in the upshot it is like [the Applicant's application for revision] a mere kicks of a dying horse ***in articulo mortis*** [at the point of death].

Application for revision is hereby entirely dismissed ***in toto*** the CMA award is upheld and confirmed thereof.

I.S. Mipawa
JUDGE
05/06/2015

[35] Rycoft and Jonathan a guide to South Africa Labour Law 2nd Ed. at p. 186 quoted from the case of Paul Mahidi and Athumani Dimwe V. Williamson Diamonds Ltd., Revision No. 9 of 2014 HCLD at Shinyanga

Appearance:-

1. Applicants: Absent [though they are aware of the Judgment date]
2. Respondent: Mr. Sam Katerega, Personal Representative

Court: Judgment has been read today in the presence of the party shown above. Right of appeal explained.

I.S. Mipawa
JUDGE
05/06/2015