

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**AT ARUSHA**

**LABOUR DIVISION**

**REVISION NO. 33 OF 2019**

**(Originating from Labour Dispute No. CMA/ARS/ARB/181/2018)**

**EASY TRAVEL AND TOURS LTD.....APPLICANT**

**VERSUS**

**ANDREA EZEKIEL KIWALE.....RESPONDENT**

**JUDGMENT**

**17/03/2020 & 04/05/2020**

**GWAE, J**

The applicant in this Revision calls upon this court to inspect the records of the Commission for Mediation and Arbitration (CMA) in the dispute registered as CMA/ARS/ARB/181/2018 and set aside the ward thereof. The application is brought under section 91(1) (a), (b), and (2) (a), (b) and 94 (b), (i), (d) and (e) of the Employment and Labour Relations Act No.6 of 2004 (Act) and Rules 24 (1), (2) (a), (b), (c), (d), (e), (f) and (3) (a), (b), (c), (d) and 28 (1) (c), (d), (e) of the Labour Court Rules G.N No. 106 of 2007 (Rules).

The background of the dispute in brief is that, the respondent was an employee of the applicant as a "Body Work Supervisor" from 01/11/2017 until 13/06/2018 when he was officially terminated from employment for

the reasons of, **firstly**, the alleged browsing on the website irrelevant to his work during working hours, **secondly**, failure to supervise his work and staff leading to poor performance of the staff and **lastly**, some vehicles were not properly repaired due to failure of proper supervision.

Aggrieved by such decision the respondent referred his complaint to the Commission for Mediation and Arbitration of Arusha at Arusha (CMA) on 05/07/2019. The CMA heard and determined the complaint on merit and in its final analysis it found that the applicant's termination was unfair both substantively and procedurally and consequently ordered for the payment of Tshs. 11,088,000/= being 12 months' salary compensation in favour of the respondent. Dissatisfied with the CMA award the applicant knocked the doors of this court, hence this application.

On hearing of this matter, the applicant was dully represented by the learned advocate known by name of **Mr. John Massangwa** whereas the respondent appeared in person. Parties orally argued this application.

The applicant's advocate firstly prayed for the court's adoption of his affidavit and further submitted that, if the court is of the view that the respondent was unfairly terminated he should be paid lowly as the employer had substantially paid the respondent his rights such as notice, salary, annual leave, 13 days worked and a certificate of service. The counsel cited the case of **Pascal Bandiho vs. Arusha Urban Water Supply & Sewage Authority** Revision No. 76 of 2015 where the court held that if the employer had adhered to procedures stipulated under Rule 13 of the Code of Good Practice except few procedures payment of less

compensation be in alternative. The counsel for the applicant went on submitting that he is of the view that the respondent was fairly terminated with valid reason and thus he prayed for the CMA award be revised and set aside or this court be pleased to order for a lesser compensation.

The respondent on the other hand submitted that on the material date (Saturday) he was working from his office and that, as a supervisor he was not necessarily supposed to closely supervise his subordinates who were also technical officers. The respondent was of the opinion that the award given by the CMA was just and fair.

It is established principle that for the termination of employment to be considered fair it should be based on valid reason and fair procedure. In other words there must be substantive fairness and procedural fairness of termination of employment, as per Section 37 (2) of the Act. The intention of the legislature is to require employers to terminate employees only basing on valid reasons and not at their will or whims. This is also the position of the International Labour Organization Convention (ILO) 158 of 1982, Article 4. In that spirit employers are required to examine the concept of unfair termination on the basis of employee's conduct, capacity, compatibility and operational requirement before terminating employment of their employees. **See: Tanzania Revenue Authority v. Andrew Mapunda** Revision No. 104 of 2014.

Having considered the records of the case at hand the main issues for determination by this court are;

- i. Whether the CMA was correct to hold that there was no valid reasons for termination.
- ii. Whether the CMA was correct to hold that procedures for termination were not followed.
- iii. Whether the award of 12 months' compensation was justifiable.

From the evidence and facts given in the CMA particularly Exh. P3 (letter of termination) the applicant termination was because of three reasons and I wish to quote for easy of reference;

- i. "That you are browsing on the website irrelevant to your work at working hours of the work.
- ii. That you failed to supervise your work and staff leading to poor performance of the staff under your supervision.
- iii. That you (sic) some of the motor vehicles are not properly repaired due to failure of proper supervision.

From the available evidence on CMA records, I do not find anything to fault the arbitrators' holding that the applicant's termination was substantively unfair. Of all the mentioned reasons for termination none had been proved before the disciplinary committee leave alone the fact that the director who caught the respondent browsing during official hours never entered appearance in the disciplinary hearing committee to give his evidence.

The issue of poor performance has been extensively elaborated in Rule 17 & 18 of the Employment and Labour Relations (Code of Good Practice) GN 42 of 2007 Rule 17 has given criteria to be taken into consideration by the court in determining termination of employment based on poor performance. Rule 17 (1) reads as follows;

"17 (1) any employer, arbitrator or Judge who determines whether a termination for poor work performance is fair shall consider;

- (a) Whether or not the employee failed to meet a performance standard.
- (b) Whether the employee was aware or could reasonably be expected to have been aware, of the required performance standard.
- (c) Whether the performance standards are reasonable.
- (d) The reasons why the employee failed to meet the standard and
- (e) Whether the employee was afforded a fair opportunity to meet the performance standard.

Rule 18 of the Rules further gives guidance to the employers before terminating their employees' employments on the ground of poor performance. For clarity Rule 18 is extensively reproduced herein under;

"18 (1) the employer shall investigate the reasons for unsatisfactory performance. This shall reveal the extent to which is caused by the employee.

(2) The employer shall give appropriate guidance, instruction or training if necessary, to an employee before terminating the employee for poor performance.

(3) The employee shall be given a reasonable time to improve. For the purpose of this sub-rule, a reasonable time shall depend on the nature of the job, the extent of the poor performance, status of the employee length of service, the employee's past performance record.

(4) Where the employee continues to perform unsatisfactorily, the employer shall warn the employee that employment may be terminated if there is improvement”.

Given the above principles of law together with all the facts gathered at the CMA’s record, it is therefore apparent that the respondent termination was substantively unfair.

On the **second issue** as to whether proper procedures were followed, once more I join hand with the Arbitrators’ findings that the applicant did not follow proper procedures in particular on the issue of investigation. At page 7 of his award the Arbitrator stated that;

“It is noted after the Director caught him browsing internet, accused him of several offences, and instantly served him notice to attend the disciplinary hearing, without conducting investigation. The requirement for investigation is mandatory to the employer who wishes to hold the rearing.”

I would also wish to add to that, the employer also did not abide to the requirements of Rule 18 as explained above given that one among the reasons of termination is on the poor performance. To this end, I am persuaded that, the employer did not follow proper procedures in terminating the respondent.

Coming to the **last issue**, Section 40 (c) of the Act is very clear that if an Arbitrator or Labour Court finds a termination is unfair, the Arbitrator or Court may order the employer to pay compensation to the employee of not less than twelve months’ remuneration. This implies that the court may

order the payment of compensation to the employee of twelve or more than twelve months' remuneration depending on the circumstances of the case but shall not order the payment of less than twelve months' remuneration **unless** there are special reasons such as economic crisis or proven economic instability in an entity as was judicially stressed in **Abdallah Khalid v. Water Drilling Solutions Co. Ltd**, Labour Revision No. 8 of 2018 (unreported) or the procedures were greatly followed except in few areas (**Pascal Bandiho vs. Arusha Urban Water Supply & Sewage Authority** Revision No. 76 of 2015 (unreported) cited by the applicant's advocate). Therefore twelve months' remuneration is the minimum requirement. Sub section 2 of the above section further states that;

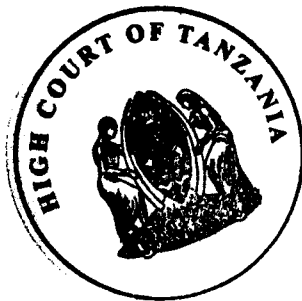
“(2) An order for compensation made under this section shall be in addition to, and not a substitute for, any other amount to which the employee may be entitled in terms of any law or agreement”.


According to the reason the respondent was paid all of his terminal benefits and taking into account of closure or lock down of the businesses due to novel coronavirus that is affecting the world wide, the applicant inclusive. The respondent is therefore equitably entitled to a certain degree of mercy.

With the above principles of law and reasons given herein, this application is dismissed accordingly save to the amount to be reduced after considering the prevalence of the Pandemic disease (Covid-19) I therefore

find it prudent the applicant be awarded **eight (8)** months' salaries compensation instead of 12 months compensation previously awarded by the arbitrator. He is now entitled to Tshs.**7, 392, 000/=**. Each part to bear its own costs.

It is so ordered.



  
**M.R. GWAE**  
**JUDGE**  
**04/05/2020**