IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF SHINYANGA

AT SHINYANGA

LABOUR REVISION NO.46 OF 2016

(Originating from Labour Dispute CMA/SHY/211/02/2011)

MAJIGE M. MAKOKO.....APPLICANT

Versus

PANGEA MINERALS LIMITED.....RESPONDENT

Date of Last Order: 14/11/2019

Date of Ruling: 14/02/2020

RULING

C. P. MKEHA, J

On 16th October, 2010, the applicant was employed by the respondent in the capacity of *"equipment operator"* at Buzwagi Gold Mine. Then on 14th November, 2011, the applicant's services with the respondent were terminated for what is expressed in the termination letter as *"breach of organizational rules and regulations, breach of relationship of trust and cohesion to sabotage machinery."* The applicant decided to refer the decision of his employer, to the Commission for Mediation and Arbitration of Shinyanga, challenging unfair termination of his employment for the

employer's failure to offer reasons for termination and procedural irregularities as well.

On 19th March, 2012, the Commission held that legal procedures for terminating the applicant were properly followed and that, there were justifiable reasons for the said termination. In view of the Arbitrator, the applicant's termination was fair. However, the learned arbitrator added that, since there was no direct evidence proving sabotage on part of the applicant, it was only fair that, the applicant be given compensation. In terms of Rule 32(5) of GN. No.67 of 2007, the arbitrator awarded compensation of six months' salary to the applicant.

The applicant was dissatisfied. He therefore filed the present application asking this court to revise the Commission's award due to irregularities on the face of it. He also asked this court to order his reinstatement and payment of all remunerations and entitlements from termination date.

In arguing the present application, the applicant was represented by Mr. Benjamin Dotto (TAMICO). On the other hand, the respondent was represented by Mr. Kange learned advocate.

It was submitted for the applicant that, the arbitrator was wrong in not finding that the respondent failed to prove allegations against the

applicant. It was submitted further that, whereas there was an allegation that the applicant was sabotaging the respondent's interests and that, the key witness was never brought before the Commission. Mr. Benjami Dotto pointed to the arbitrator's holding that there was no direct evidence on involvement of the applicant in the alleged sabotage.

Mr. Benjamin Dotto went on to submit that, the applicant was terminated without being heard. That, although the applicant had earlier objected the holding of disciplinary proceedings, the respondent proceeded hearing the matter in the applicant's absence. Finally, it was prayed that the applicant be reinstated in terms of section 40(1)(a) of the Employment and Labour Relations Act.

Mr. Kange learned advocate submitted in reply that the standard of proof required to prove sabotage was on balance of probabilities. According to the learned advocate, the award indicates how the respondent proved the said sabotage.

The learned advocate went on to submit that, despite being invited for hearing by the disciplinary committee, the applicant opted not to attend the disciplinary meeting on advice from TAMICO.

The learned advocate was unaware of the law under which the applicant's objection to disciplinary hearing, was made.

The learned advocate insisted that, it is not the position of the law that, once investigation is underway, then, the employer is barred from holding disciplinary meetings. The learned advocate finalized by submitting that, the applicant accepted six months' salary as part of compensation.

Save for Mr. Benjamin's concession that the standard of proof to prove sabotage was on balance of probabilities, the rest of his rejoinder was a reiteration of what he had earlier submitted in chief.

It was the Commission's holding that there were justifiable reasons for the applicant's termination. In view of the Arbitrator, despite the fact that there was no direct evidence proving sabotage on part of the applicant, the termination was fair.

With respect, I think, prior to the Commission considering whether the employer acted reasonably in treating a reason as justifiable or sufficient for terminating an employee, it must first establish what the reason for termination was.

The Blacks Law Dictionary defines the term sabotage as *"the intentional and deliberate destruction of property or the obstruction of an activity."* Sabotage by employees at work places, may be characterized by intentional anti collegial behavior, professional dishonesty, abuse of power negativity, non compliance or underperformance. **See:** *Elaine Wallace, Michael Hogan, Chris Noone & Jenny Groarke (2018):* ***Investigating components and causes of sabotage by academics using collective intelligence analysis, Studies in Higher Education,*** *DOI: 10.1080/03075079.2018.1477128. Available at https://doi.org/10.1080/03075079.2018.1477128, published online on 24th May, 2018.*

It is true that in some cases, it may not be easy to prove sabotage of an employee against his employer. However, if the employer has reasonable grounds for sustaining a genuine belief about the employee's guilt, after carrying out an investigation, this is likely to be sufficient. In the **first** place, it must be decided whether according to the ordinary standards of reasonable and honest people, what was done by the employee was dishonest. **Secondly,** it must also be decided whether the employee must have realized that what he was doing was, by those standards, dishonest

or sabotage to the interests of his employer. As a matter of fact, not all unreasonable conducts will necessarily be culpable, it will in all cases depend on the degree of unreasonableness.

In the present case, the reason for termination was **breach of organizational rules and regulations, breach of relationship of trust and cohesion to sabotage the employer's machinery on part of the employee/applicant.**

After analysis of the evidence on record the learned arbitrator held that there was no direct evidence to the effect that the applicant had indeed engaged himself in sabotaging the interests of the employer. Although in terms of Rule 9(3) of GN. No.42 of 2007, proof of the allegations on balance of probabilities would have sufficed, there was no specific finding on part of the arbitrator that, such standard of proof, was attained by the employer. In the absence of proof of the allegations, to the required standard, the holding that the termination was fair was unjustified.

However, the arbitrator was specific that the evidence on record proved the fact that there was no more trust between the applicant and the respondent as it ought to be the case. This holding is not contested by the applicant in the present application. Therefore in circumstances whereby

there was breach of the fundamental relationship of mutual trust and confidence between the applicant and the respondent, it would not have been proper to order reinstatement of the applicant.

There is no denial on part of the applicant that he was invited to attend and defend himself against the allegations before the disciplinary committee. All what the applicant insists is that, he preferred an objection to the said hearing, since investigation on his allegations was underway. It is not the position of the law that once criminal investigation on allegations against an employee is underway, then the employer is barred from holding disciplinary hearing involving the employee in question, even when the said investigation and disciplinary hearing are being conducted by two distinct entities at different times. It is only fair to hold that, the applicant opted to waive his right of being heard, hence, he can not be right in condemning the respondent for not according him a right to be heard.

I have held that, in the absence of proof of the allegations against the applicant to the required standard, the holding that his termination was fair, was unjustified. In other words, for failure of the employer to prove sabotage allegations on part of the applicant, the applicant's termination was unfair. It is also this court's holding that, in the absence of mutual

trust and confidence between the applicant and the respondent an order for reinstatement of the applicant would not have been proper.

The remaining question is whether in the circumstances of this case, it was proper for the arbitrator to reduce compensation to six months' salary. It is true that an arbitrator who has found unfair termination, has discretion to award an appropriate amount of compensation, found to be fair and just to both parties. That is why, in a number of occasions, section 40(1)(c) of the Employment and Labour Relations Act has been held, not to mandate the arbitrator to order compensation of 12 months' salary in all cases of unfair termination. **See:** 1. **DEUS WAMBURA VS MTIBWA SUGAR ESTATES LIMITED,** Revision No.3 of 2014 by Madam Judge Rweyemamu (as she then was) 2. **MICHAEL KIROBE MWITA VS AAA DRILLING MANAGER,** Revision No.194 of 2013 by His Lordship Mipawa, J. (as he then was)

In the present case, the Commission awarded six months' salary to the applicant, for loss of employment. The arbitrator's reasoning was that, the award, took into account, among other things, a possibility of the applicant to get alternative employment elsewhere, well-being of other employees and security of the employer's assets.

The arbitrator appears to have ignored Rule 32(5)(a) to (f) of the Mediation and Arbitration Guidelines of 2007 which require the arbitrator to consider the following in the award of compensation:

(a) Any prescribed minima or maxima compensation.

(b) The extent to which termination was unfair.

(c) The consequences of unfair termination for the parties including the extent to which the employee is able to secure alternative work or employment.

(d) The amount of employee's remuneration.

(e) The amount of compensation granted in the previous similar cases.

(f) The parties' conduct during proceedings and other relevant factors.

The above listed, are some of the factors for consideration before making an order for compensation. From the said list, it seems that, the Commission should first assess the amount which is just and proper to award to the employee since, this, may have a significant bearing on what reduction to make for the contributory conduct of the employee.

In deciding whether to reduce compensation or not the Commission must take into account the conducts of the employee and the employer and not factors relating to the remaining employees. Consequences of the unfair termination to the employee and the employer should also be considered.

Having found that the employee was to blame in the circumstances of the case, the Commission, is then entitled to reduce the award to some extent although the proportion of the employee's culpability is a matter for the commission to decide, basing on the available evidence. The onus is on the employer to prove the employee's culpability. *Read: Malcolm Sargeant & David Lewis (2012): Employment Law, Sixth Edition at pages 113 to 115.*

In the present case, there was no direct proof of the allegations against the applicant. The only justification for the applicant's termination if any, was absence of mutual trust and confidence between the employee and the employer.

The arbitrator reduced the compensation amount basing on factors relating to the remaining employees and the employer's interests contrary to what the obtaining guidelines provide. For the foregoing reasons, in addition to compensation already received by the applicant, the court orders payment

to the applicant by the respondent, of six months' salary to make a total of twelve (12) months' salary.

Dated at **SHINYANGA** this **14th day of February, 2020.**

C. P. MKEHA
JUDGE
14/02/2020

Court: Ruling is delivered in the presence of the applicant in person and Ms. Pendo Gimelo for the respondent.

THE HIGH COURT OF TANZANIA

C. P. MKEHA
JUDGE
14/02/2020