IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
HIGH COURT LABOUR DIVISION SHINYANGA

AT SHINYANGA

LABOUR REVISION NO. 11 OF 2020

(Originated from an award of the Commission for mediation and arbitration of Shinyanga CMA/SHY/211/2019 dated the 19th February, 2020)

BRUNO ALLEXENDER..... APPLICANT

VERSUS

LITLE TREASURES NURSERY & PRIMARY SCHOOL.....RESPONDENT

JUDGMENT

Date of the last Order: 4th September, 2020
Date of the Ruling: 5th October, 2020

MKWIZU, J.:

Applicant was employed by the respondent as a driver in a fixed term contract commencing from 1st March, 2019. His employment was terminated on 19th November, 2019 on misconduct. Aggrieved with the termination, applicant filed CMA Form No 1 with the Commission for Mediation and Arbitration claiming for unfair termination. At the CMA, three issues were framed, ***one***, whether parties had employer-employee relationship properly so called and of which type, ***two*** whether the respondent adhered to the

procedure and had valid and fair reason in effecting termination and ***three,*** what relief parties are entitled to.After hearing parties, the CMA found that there was no valid contract between the parties. It was concluded that, the agreement was contrary to the law from its commencement and therefore could not be enforced by the commission. The bases for its findings were that, at the time of entering into agreement, applicant possessed no qualification to drive a school bus as per the Law regulating the driving industry.

Applicant was not happy, he filed the present revision application seeking for revision of the CMA decision in CMA/SHY/211/2019 dated 19th February, 2020 and order respondent to pay him accordingly for unfair termination.

The application was through a notice of application made under Sections 91(1) (b) 91 (2) (a), (b), 2 (a0 and (b), 3 and 4 and section 94 (1) (b) (i) of the Employment and Labour Relations Act No. 6 of 2004 read together with Rules 24 (1), 24 (2), 24 (3) and 28 (1), (c) and (d) of the Labour Court Rules, G. N. No. 106 of 2007 and supported by applicant's own affidavit .In

Paragraph 15 of the affidavit, applicant raised issues for consideration by this Court namely:

a. *Whether the arbitrator was right to dismiss the complaint of the applicant*
b. *Whether the contract between the applicant and the respondent was void*
c. *Whether the applicant was not entitled to payments*
d. *Whether the employee was lawfully terminated*
e. *Whether the applicant should be awardee costs.*

The revision was opposed by the respondent who filed a counter affidavit sworn by Wilfred Mwita on 9th March 2020.

By the leave of the court, the application was heard by way of written submissions. Mr. Frank Samwel learned Advocate represented the applicant while the respondent had the services of Mr. Shabani Mvungi, also learned counsel.

In his written submission, Mr. Frank samwel faults the arbitrator for dismissing the applicant's claim basing on the qualification while the parties agreement had no specification on the qualification required then. He said, the applicant possessed a driving licence with class D while the arbitrator said he was supposed to possess Class C Driving License contrary to the agreement of the parties. Mr. Frank argued further that, even the letter of termination did not mention lack of qualification as a ground for termination. He insisted that, the arbitrator acted with biasness' when he concluded that the driver of a school bus must possess a class C driving license without any justification.

On whether the parties' contract was void or not, applicants counsel argued that, the issue of the validity of the driving license was not at issue all along from when the parties entered into an agreement and even on termination. If so it would have been reflected on the termination letter. This issue just sparked out during hearing at the CMA.MR. Frank clarified further that, applicant was properly interviewed, tested and his Driving License remitted to the employer without any doubt, thus coming later to complain on the

applicant's qualifications based on his Driving License Grades is an after sought.

He concluded that, applicant's employment was terminated without following the procedure. He was not given the right to be heard and without his terminal benefits. He prayed for the reverse of the CMA's decision and that the court should pronounce that the applicant was unfairly terminated and thereafter award the applicant his terminal benefits itemized as one month's salary in lieu of notice, one month salary for unpaid leave, salaries for the rest three months, compensation for underpayment to the tune of 140,000 times 10 which is equal to 1400,000/=

In his reply, while agreeing that applicant surrendered his driving license to his employer before the contract was entered into, respondent counsel was of the view that, arbitrator was right in dismissing the applicants claim on the reason that the employment contract was void ab initial for lack of qualifications by the applicant. Mr. Shaban explained that, applicant contravened the provisions of section 19 and 20 of the Road Trafic Act Cap

168 R.E 2002.On the same reasons, Mr. Mvungi argued that applicant was not entitled to any payments whatsoever.

In his rejoinder submissions, applicants counsel repeated his prayers in the Notice of applications.

I have read, examined and digested the rival submissions filed by the respective legal counsel for the parties herein. I will begin with the second issue on whether there was valid employment contracts between the parties. It is on records that, applicant was employed as a driver after he has passed the tests by the respondents. Applicant assertions were that he was interviewed, tested and his driving license with Class D surrender to the respondent before entering into employment agreement with his employer, the respondent. A general look at the employment contract, nothing suggests illegality. I have tried to see whether there are terms relating to the applicant's qualification particularly on the Driving license grades. Sincerely, the contract is silent. I have again tried to see what exactly prompted the arbitrator to find the applicant unqualified on his posts a driver. Neither the contract, nor the notice of termination states the issue of

qualification as a reason for termination. This allegation just arose during hearing of the applicant's claims at the CMA, nothing was cited to justify the claim. I think this point was brought by the respondent as an after sought. If it was a genuine reason, it would have featured in the termination notice. I thus find the arbitrators finding that the contract between the parties is void unjustified. The above disposes of issue no 2 and 1.

I now move to issue no 4 as to whether the applicant was lawful terminated. The employment and Labour Relations Act, 2004 provides that it shall be unlawful for an employer to terminate the employment of an employee unfairly. Section 37 reads as follows:-

> *"37 (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."*

It is on records that, applicant was terminated for misconduct. The notice of termination served upon him on 19/11/2019 gave the reasons for termination.The notice partly reads:

"Uongozi wa shule unalufahamisha kwamba ni muda mrefu sasa umekuwa ukilalamikiwa na wazazi mara kwa mara kwa sababu zifuatazo:-

i. Kuwaacha Watoto vituoni muda wa asubuhi na kuwasababishia kukosa masamo yao
ii. Kubadilisha vituo vya Watoto ulivyopangiwa bila kufuata utaratibu
iii. Kufokeana na kuwajibu ovyo wazazi

...kwa barua hii...taaisi imeridhia kukupa barua ya notice ya mwezi mmoja ya kutokuwa na Imani na kuendelea kufanya kazi nawe kuanzia tarehe 20/12/2019..."

From the termination notice above, three reasons were enumerated for termination of the applicant's employment. Whether the reasons are valid and fair, needs proof from the employer. This is the requirement under section 39 of the ELRA which places the duty to prove the fairness of the termination on the employer.

In their evidence, DW1, DW2, DW3 and DW4 gave two reasons necessitated the applicant's termination from employment. One, that applicant was informally employed without following the procedure and without qualifications. The main concern was that applicant had a Class D Driving Licence instead of Class C which is a proper Driving License for School bus drivers. Second reasons is the applicant's conduct. Respondents' witnesses said applicant behaviors were improper and incompatible with the working environment of academic institutions. It was also testified that, applicant used vulga language to pupils and the parents and he could decide not to pick up pupils and could change roots without permission despite the oral warning. As stated while analyzing the two grounds above, I think the first reason for termination is an after sought. May be to add some few other reasons for disbelieving respondent on this reason. One that it is the Managing Director , DW1 who employed the applicant with the complained Class D driving license. He is the one who knew the qualification he wanted from his employee. secondly, the termination letter never raised the lack of qualification allegations as a ground for termination. I have been wondering how the applicant could have employed a non-qualified person, work with, terminate him on that ground and issue a termination letter without

mentioning that ground as a cause, just to know that his employee does not possess the qualification required during the hearing at the CMA.

Despite the above conclusion, as would be noted from the notice of termination, three reasons were stated as to why the applicant employment was terminated. It is without doubt that the applicant's misconduct was witnessed by the respondent's management and the respondent's client. The mentioned misconduct falls squally under the provisions of rule 12 of the Employment and Labour Relations (Code of good practice) Rules. GN No 42 of 2007. The rule provides:

> *"12 (1) Any employer, arbitrator or judge who is required to decide as to termination for misconduct is unfair shall consider;*
>
> *(a) Whether or not the employee contravened a rule or standard regulating conduct relating to employment*
>
> *(b) I f the rule or standard contravened, whether or not;*
>
> *(i) It is reasonable*
>
> *(ii) It is dear and unambiguous*
>
> *(iii) The employee was aware of it*
>
> *(iv) It has been consistently applied by the employer.*

(v) Termination is appropriate sanction for contravening the rule.

(2) N/A

(3) The acts which may justify termination are-

(a) gross dishonesty;
(b) wilful damage to property;
(c) wilful endangering the safety of others;
(d) gross negligence;
(e) assault on a co-employee, supplier, customer or a member of the family of, and any person associated with, the employer; and
(f) gross insubordination.

(4) In determining whether or not termination is the appropriate sanction, the employer should consider –

(a) ***the seriousness of the misconduct in the light of the nature of the job and the circumstances in which it occurred, health and safety, and the likelihood of repetition****; or*

(b) the circumstances of the employee such as the employee's employment record, length of service, previous disciplinary record and personal circumstances." (bold is mine)

Going by the evidence on the records, it is clear that, applicant conduct were detrimental not only to his employer but also the respondent's client. I am convinced that though issue of qualification wasn't the reasons for

termination, the rest of the reasons were valid under the circumstances of this case. In other words, the respondent had valid and fair reasons to terminate the contract.

However, the procedure for termination are questionable. Fairness of procedure for termination of employment is one of the requirements of the law under section 37 (2) (c) of the Employment and Labour Relations Act, 2004. It is a trite law in labour dispute that there is no an outright termination of one's employment even with a gross misconduct. The employer is required in each case to follow the stipulated guidelines under rule 13 of the Employment and Labour Relations (code of good practice) Rules. GN No 42 of 2007. The rules prescribe for the following guidelines:

i. *The employer must conduct an investigation to ascertain whether there are grounds for a hearing to be held.*

ii. *Where a hearing is to be held, the employer must be notified of the allegation in the language that he/she understand*

iii. *Employee should be given reasonable time reasonable time to prepare for the hearing which in any case should not be less than 48 hours*

iv. *At the hearing the employee has a right to be assisted by a trade union representative or fellow employee.*

v. *The hearing is to chaired by a sufficiently senior management representative who should not have been involved in the circumstances giving rise to the case.*

- *Evidence in support of the allegations against the employee must be presented*
- *Employee should be allowed to bring witnesses and also to cross examine witnesses of the Employer.*

vi. *Where an employee unreasonably refuses to attend the hearing, the employer shall proceed exparte*

vii. *Employee must be given an opportunity to put forward any mitigating factors before a decision is made on the sanction to be imposed.*

viii. *After the hearing, the decision must be communicated to the employee in writing with reasons for the said decision.*

ix. *Where employment is terminated, the employee shall be given the reason for termination and reminded of any rights to refer a dispute to the Commission for Mediation and Arbitration.*

The above guidelines are not without exceptions, rule 13 (11) of GN No 42 of 2007 provides specifically that :

> *"(11) In exceptional circumstances, if the employer cannot reasonably be expected to comply with these guidelines, the employer may dispense with them.* ***An employer would not have to convene a hearing if action is taken with the consent of the employee concerned.*** *" (Emphasis added)*

And sub-rule 12 tasks the employer with the duty to keep records of each disciplinary action conducted in respect of each employer. The rule says :

> *" (12) Employers shall keep records for each employee specifying the nature of any disciplinary transgressions, the action taken by the employer and the reasons for the actions."*

This, in my view is not without reasons, it aims at enhancing transparence in the employment relationship as well as assisting in establishing the validity and fairness of the termination in case of any dispute.

Reverting back to the dispute at hand, it is evident from the records that there were several oral warnings to the applicants as to his misconduct. Nothing was said on the utilization by the employer of the above stipulated

mandatory procedure.DW1 was recorded to have said that he decided to exercise his contractual rights of issuing a notice of termination as per the employment contract. I think this was a misconception. In whatever the circumstances, the employer has no power to arbitrarily terminate the employee's employment. The above procedure, must be followed. In the case of **NBC Ltd Mwanza v. Justa B. Kiyaruzi** Revision No. 79/2009 HC Labour Division Mwanza Sub registry (Unreported) where she held that;

> *"Ingredients of fair hearing are the right to be made aware of the charge, and given reasonable time to prepare and be heard in defense; an opportunity to cross examine employers witness (he accusers) and in the context of the act, the right to be assisted at the hearing by a union representative or a friend* ***what is important is not an application of the code in the checklist fashion, rather to ensure the process used to adhere to basics of fair hearing in the Labour Content depending on the circumstances of the parties, so as to ensure the act to terminate is not reached arbitrarily****"* *(emphasis added).*

Respondent did not conduct any Disciplinary Hearing, he, in general acted contrary to rule 13 and nothing was explained to justify exceptions stipulated under rule 13 (11) by so doing he condemned the applicant without affording him a right to be heard contrary to the rules of natural justice. In the case of **Abbas Sherally and Another V. Abdul Sultan Haji Mohamed Fazal boy,** Civil Application No. 33 of 2002 (unreported) the court observed that;

> "*the right of a party to be heard before adverse action or decision is taken against such a party has been stated and emphasized by the Courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because the violation is considered to be breach of principles of natural justice.*"

See also: National **Microfinance Bank v. Rose Laizer**, Revision No. 123 of 2014 (HC-Lab Div. at Arusha)

The last issue is on what are the reliefs parties are entitled to. Applicant claims presented in CMA Form No. 1 filed at the CMA on 19/11/2019 includes twenty four months' salary, one month's salary in leu of leave, one month notice in leu of notice , however, in his Opening Statement he added another claim of payment of 2600,000 for unlawful termination and compensation for underpayments to the tune of 140,000 times 10 which is 1400,000/= was presented during the written submissions in support of the revision.

As hinted above, applicant's employment was for a fixed term of 12 months, signed on 1/3/2019 and terminated on 19/11/2019. In the case of Good **Samaritan vs. John Robert Savari Munthu**, labour revision No.165 of 2011, LLCD No.9 of 2013 it was held that:

> *"when an employer terminates a fixed term contract the loss of salary by the employee of the remaining period-unexpired term is a direct foreseeable and reasonable consequence of the employer's wrongful action."*

The applicant is therefore entitled to salary of the three months unexpired term of contract. It is on the records that the applicant's salary was 120,000 times three months is equal to 360,000.

Coming to his claim of one-month salary in leu of notice, the law requires that before termination, employer must give the employee a one month's notice of termination containing reasons for the termination contrary to that, the employee is entitled to one-month salary in leu thereof. There is evidence to prove that, applicant was issued with a statutory as well as contractual notice of termination dated 19/11/2019.Thus, applicant is not entitled to one-month salary in leu of notice.

Another entitlement is a payment of annual leave. No evidence that applicant utilized his leave. The law under section 44 (1) (b) of the ELRA provides that during termination of employment contract, the employer should pay the employee an annual leave accrued but not taken. This being the case, Applicant is entitled to one-month salary leave that would have accrued if the contract would have gone to its conclusion which is 120,000.

Other claims are denied on the reasons that they are not rightful claims to an employee whose contract of employment was for a fixed term

In the result, under section 91 (4) of the Employment and Labour Relations Act, read together with rule 28 (1) and 55 b(2) of the Labour courts rules GN No 106 of 2007, I revised the arbitrators decision, quash the same , despite the fact that respondent had a valid reason for termination, it is declared that the termination was procedurally unfair. Consequently, the respondent is ordered to pay the applicant a total sum of 480,000/= (four hundred and eighty thousand only.)

Being a labour matter, I make no order as to costs.

It is so ordered.

DATED at **SHINYANGA** this 5th day of **October,** 2020.

E.Y. MKWIZU
JUDGE
05/10/2020

Court: Right of appeal explained.

E.Y. MKWIZU
JUDGE
05/10/2020