IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

AT MOSHI

LABOUR REVISION NO. 20 OF 2019

(c/f Labour Dispute No. CMA/KLM/ARB/O6/2018)

BETWEEN

DAVID RUBEN SENGE.....APPLICANT

VERSUS

SOLAR SECURITY SERVICE LTD.....RESPONDENT

JUDGMENT

06/10/2020 & 20/11/2020

MWENEMPAZI, J

The applicant filed this application applyiing for revision of the award of Commission for Mediation and Arbitration in Labour Dispute No.CMA/KLM/ARB/06/2018 which was delivered on 14th August 2018 by Hon. Mgendwa, Arbitrator.

The background is that the applicant was employed by the respondent as a Security Guard on 12th June 2012 with a basic salary of Tsh 100,000= per month. He was terminated from the employment on 16th October 2012 for misconduct based on drunkenness and attending at his station late. The applicant was aggrieved and referred his complaint to the CMA claiming that he was unfairly terminated and prayed to be re-instated without interfering with his employment benefits. The matter was

heard and the CMA found that there were valid reasons for termination but the procedures were not followed. The arbitrator ordered the respondent to pay the applicant one month's salary in lieu of notice, leave allowance, the salary of 16 working days, compensation of four months' salaries for unfair termination, and certificate of employment. The applicant was still aggrieved with such a decision. He filed this application seeking this court to revise and set aside the arbitrator's award and to order the applicant to be re-instated without loss of his benefits instead of compensation which he was awarded.

At the hearing, Mr. Jamael Ngowo, Advocate appeared for the applicant while the respondent was represented by Mr. Gervas Manota, the Personal Representative. The parties were granted leave to argue the application by way of written submissions.

In the applicant's written submission, Mr. Ngowo submitted that the applicant was bitterly aggrieved by the award of the Commission when he ordered the applicant to be paid compensation of four months' salary which was unjustifiable and not according to law. The counsel referred the court to the case of ***Rajabu Malenda vs. Security Group (T) Ltd*, Lab. Div. No. 188 of 2015 at TZHC DSM registry** (unreported) where the court cited section 40(1)(c) of Act No. 6 of 2004 and said that where termination was procedurally unfair then the employer has to pay the complainant 12 months remuneration. Mr. Ngowo submitted that since the respondent violated section 37(2) of the ELRA and Rule 13 of GN 42 of 2007 then the Arbitrator ought to have ordered compensation to the applicant of 12 months remuneration according to law.

Turning to the second limb of whether the termination was fair, Mr. Ngowo submitted that rules 9(4) of the Employment and Labour Relations

(Code of Good Practice) Rules 2007 (GN No. 42 of 2007) provides for reasons by which a contract of employment may be terminated. Also, he submitted that the employer must prove beyond reasonable doubt that the employee was negligent. The counsel submitted that in the present matter the respondent failed to prove that the applicant directly breached the company policies and procedure. He contended that the arbitrator failed to analyze the testimony of DW1 which was hearsay evidence. He contended that the evidence tendered does not hold water to find the termination was fair. The counsel said all the finding in the award is from the arbitrator's mind and not on evidence. The counsel submitted that if the employer fails to prove the termination was fair then the termination will be unfair as reflected under section 37(2) of ELRA. The counsel finally prays for this court to intervene and to order the respondent to compensate the applicant as prayed in CMA form No.1

In reply, the respondent submitted that there was a reason for termination as correctly found by the arbitrator and reinstatement had no room due to the evidence presented before the arbitrator which among other issues was the conduct of the applicant to leave his working uniform to the 2nd witness of the respondent for one month without the consent of his employer. The respondent submitted that the reason for the termination of the employment contract was reasonable.

On the issue of awards of four months' salaries, the respondent submitted that the applicant did not deserve such payment due to his prolonged misconduct. They contended that where there is a valid reason for termination of employment and the employee awarded less than 12 months payment of compensation then such payment is a right. They referred the court to the case of ***Vedastus S. Ntulanyenka and 6***

***Others vs.Mohamed Trans Ltd*, Revision No. 04 of 2014 TZHC Labour Division at Shinyanga registry** (unreported).

On the issue of whether the termination was fair, the respondent submitted that the evidence before the Arbitrator shows that the applicant was grossly dishonesty, negligent and insubordinating counduct; by prolonged misconduct to his employer and at last he even left his uniforms of work for months to a tailor which is dangerous to the employer. In such regard, they contended that it was reasonable for the respondent to terminate the employment contract as per section 37(1) of ELRA. They finally invited this court to pass through the evidence of and annexures tendered by both parties to see the misconduct which the applicant had done and apologies he made for the same misconduct and to find that the application is of no merit at all and to dismiss it.

In rejoinder, the Mr. Ngowo reiterated his submission in chief and prayed for the application to be granted.

I have gone through the record and taken into consideration the record of the CMA and this court as well as the written submissions of both parties. I find the issues worth consideration by this court are whether there were valid reasons for termination of the applicant's employment, and secondly whether the procedure for termination was followed and if the answer is affirmative then what reliefs the applicant is entitled to.

It is the established principle that for the termination of employment to be considered fairly, it should be based on valid reason followed by a fair procedure. In other words, there must be substantive fairness and procedural fairness of termination of employment. That is reflected under

section 37 (2) of the **Employment and Labour Relations Act, No. 6 of 2004** which states that:-

> *"(2) A termination of employment by an employer is unfair if the employer fails to prove-*
>
> ***(a)*** *That the reasons for 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."*

Based on the above provision, I do not doubt that the legislature intends to require employers to terminate employees based on valid reasons and not by their will or whims.

According to the facts and evidence presented before CMA, the termination of employment of the applicant was based on several reasons as reflected in the letter of termination marked as Exhibit "P.2" in the CMA proceedings, being misconduct through drunkenness and failure to attend at the workplace as required. The dismissal letter reveals that on 02/03/2016 he attended work while drunk; then on 25/10/2016 he failed to attend the workplace without notice; on 17/09/2017 attended the workplace without proper uniform and on 11/09/2017 he was found at workplace drunk by employees of TAZARA. However during hearing the evidence presented by respondent's witness one Adnan Shemakoko

shows that on 29/02/2016 the applicant was issued with a warning letter (exhibit R.1) for his drunkenness and failure to wear proper uniform where he replied by a letter (exhibit R.2) dated 02/03/2016 asking for forgiveness. Then the witness tendered another letter (exhibit R.3) dated 25/10/2016 which was written by the applicant asking for forgiveness for failure to attend at the workplace on 21/10/2016. Then he also tenders a letter dated 17/09/2017 (exhibit R.3) where the applicant was apologizing for attending the workplace without turking in his shirt."kuchomekea uniform". In my view, the first reason for drunkenness happened way back in 2016 where the applicant did apologize and he continued with his work. There was no evidence presented by the respondent to show that the applicant had such a habit when they terminated him than a mere allegation. Also, there was no current evidence to prove than that of 2016 showing the applicant was still attending at the workplace late. The evidence presented was of 2016 while the applicant was terminated in October 2017. In my view, the act of respondent to allow the applicant to continue with the work after the warning letter implies that he was forgiven. In this situation, the respondent has no right to use the previous misconduct of the applicant to terminate him.

Furthermore, the other misconduct of the applicant to fail turk in his shirt("kuchomekea uniform") and leaving his uniform to the tailor were not stated in the termination letter as grounds for his termination. Therefore the arbitrator was wrong to rely on something which was not stated in the termination letter to be among the reasons for termination. It is trite law that whoever alleges must prove. The respondent has failed to prove that the applicant had still a drunkard habit and he failed to attend at workplace as required to warrant his termination. In that regard,

I find that there was no valid reason presented by the respondent to terminate the applicant's contract.

On the second issue as to whether the procedures for termination of employment was fairly followed, it is clear from the record of CMA that the respondent did not follow procedures for termination as prescribed under Rule 13 of the ***Employment and Labour Relation (Code of Good Practice) GN. No.42 of 2007***. That is the respondent has a legal obligation to conduct a disciplinary hearing to prove the allegations which led to the termination of the applicant. In our present matter that was not done than mere allegation from the respondent that they conducted. They did not tender any meeting minutes of disciplinary committees or investigation reports. Therefore, such failure to abide by the rules violates the applicant's right to be heard before disciplinary action taken against him.

Regarding the last issue of relief, section 40 of the ***Employment and Labour Relation Act, No. 6 of 2004*** provide clearly for the remedies once the termination of employment adjudged unfairly. That includes an order for reinstatement, re-engagement or compensation, and other entitlements. The applicant in his CMA form No.1 he prayed for reinstatement without losing his entitlement. The Arbitrator ordered the applicant to be paid compensation of four months' salary which led to this application. Section 40(1)(c) of ELRA provides that:-

> "(c) to pay compensation to the employee of not less than twelve months' remuneration"

In my view, the words "*not less*" connotes that a Judge or Arbitrator has no mandate or power to order compensation of less than twelve months

once found the termination was unfair. Therefore the arbitrator was wrong to order compensation of four months.

In the circumstances, I allow the application to the extent that, I order the applicant to be reinstated according to section 40 (1) (a) of the Act as prayed in the CMA F.1.

It is so ordered.

T. MWENEMPAZI

JUDGE

20/11/2020