IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

LABOUR REVISION NO. 91 OF 2017

(Arising from the order of the High Court Labour Division dated 20/10/2017 in Revision No. 94 of 2015, original CMA'S award by O. Mwebuga- Arbitrator, in labour Dispute No. CMA/MZ/MYAM/262/2013, dated 12/11/215)

EMANUEL SAYI ..... APPLICANT

VERSUS

THE GOVERNING BODY

OF THE COLLEGE

OF BUSSINES EDUCATION .....RESPONDENT

JUDGMENT

16.4.2020 & 29.5.2020

U. E. Madeha, J

The applicant's application was brought under Section 91 (1) (a), Section 91 (2), (c) and section 94 (1) (b) (I) of the Employment and Labour Relations Act No.6 of 2004 as amended by Written Laws (Miscellaneous Amendments) No. 3 Acts of 2010 and Rule 24 (1), 24 (2), (a), (b) (c) (d), (e) (f) and Rule 24 (3), (a), (b), (c) and (d), Rule 28 (1) (b) (c) (d) and (e) of the Labour Court Rules GN. No. 106/2007.

The applicant filed a Notice of Application and chamber summons accompanied by amended affidavit of the applicant himself. The respondent challenged the application by filing a Counter Affidavit and a Notice of Opposition. The applicant in his chamber summons prayed for the following orders:

a) *That this Honourable Court be pleased to call for and examine the original records of the CMA'S proceedings and its award, in labour dispute no. CMA/MZ/NYAM/262/2013 for purposes of satisfying itself on the correctness, and legality of such decisions or awards.*
b) *That the impugned award be, quashed and thereafter revised and reinstate the applicant to his employment.*
c) *That, other reliefs be granted in favour of the applicant as the court may deem fit and just.*

At the hearing, the applicant represented himself while Mr. Lameck Merumba, state Attorney represented the respondent.

The applicant requested his affidavit be adapted to form part of his submission. He began by reproducing paragraph 21 of the said affidavit, where he said it can be reproduced to two issues, namely, whether there

were valid or fair reasons for termination and whether the respondent followed a fair procedure in terminating the applicant's employment.

He submitted that College of Business Education (CBE) is established by the College of business Education Act, cap 315, 2002 R.E, (The CBE Act), the Act that has no provision with regard to disciplinary process though one may find that the governing body is only empowered to make rules for the government, control and administration of the College as provided in section 14 (1) of the CBE Act. He argued that, none of the respondent's witness testified about what offence the applicant committed and no any rule presented. The applicant was charged for being employed by two employers and absence from duty under the Public Service Regulation G.N 168 of 2003 (Public service Regulation). The regulation that does not apply to CBE. He cited Part VI (a) of Public Service Regulation (Regulation) that Executive Agencies and Public Institutions are governed by the laws establishing respective agencies or institutions. He cited the case of **Salehe Komba and another Versus Tanzania Posts Corporation Rev. No. 12 of 2018 HC, Mwanza (unreported)** to cement his argument.

He submitted further that the employer had no valid and fair reasons depending on the seriousness of the offence to terminate the employment.

The respondent was only accusing the applicant without first introducing and circulating rules of conduct to its employee, he referred to exhibit P14 and P15. The Respondent's major complaint is that the applicant never signed a training bond therefore his permission to study Phd was not complete, but the same was not issued to other employees who went to study but they were not penalized. No any evidence submitted by respondent that requires an employee to sign a training bond. Therefore, the applicant calls upon this court that the respondent be stopped to deny that she granted the applicant the study leave.

With regard to whether the respondent followed a fair procedure in terminating the applicant's employment, he submitted that, if the Public Service Regulation were to be applied, charges were initiated by an incompetent person, it was supposed to be signed by a member of the Governing Body (disciplinary authority) contrary to Regulation 44 (2). He submitted further that the proceedings of inquiry Committee were time barred, where charges were substituted more than 60 days after the first charge of January 2013 was served to the applicant contrary to Regulation 38 (3) of the Regulation. And the proceedings were concluded out of allowable time and no extension was sought from disciplinary authority,

contrary to regulation 47 (10) and 47 (11) of the Regulation. He stated that failure to abide by those regulations makes termination unlawful. He also cited section 46 of the Law of Limitation Act CAP 89 R.E 2002 (The Limitation Act) for the court to nullify and dismiss the proceedings.

Mr. Sayi submitted that the Inquiry Committee infringed the rules of natural justice by denying the applicant to appear before the Resources Management and Administration Committee (HRMAC) and denying the applicant to appear before 96th Governing Body meeting which approved the recommendation of the HRMAC (he was invited but told to wait outside) and Lastly the composition of the inquiry committee was not impartial as it was very biased. He then cited the case of **Ezekiah T. Olouch Versus The Permanent Secretary, President office, Public Service Management and 4 others** Civil Appeal No. 140 of 2018 CAT at Dar es Salaam to that effect. He added that some members of the committee were involved in the alleged investigation and also participated in the hearing of the Inquiry Committee and Governing body committee. Also, the quorum of the members of Governing body is limited to 8 members, but they were 16 and applicant was not involved contrary to section 2 of the CBE Act. The meeting has not been confirmed, the governing body did not use hearing form as

required by Employment and Labour Relation (Code of Good Practice Rules) G.N No 42 of 2007 (Rules) all those procedures were not adhered to. Regulation 48 (1) requires the HRMAC not to recommend termination, but to submit the report and their opinion to the disciplinary authority. Likewise, the arbitrator was supposed to order reinstatement because of the reasons submitted above. Since under the Public Service Act only the President has that power to terminate an employee after considering recommendations from relevant Minister. He therefore prayed for reliefs prayed in this application to be granted.

In reply Mr. Merumba submitted that, the respondent's submission raised two new issues not reflected in his affidavit in support of his application for revision. He pointed page 6 of his submission that Public Service Regulations and Public Service Act does not apply to him and therefore renders disciplinary offences and charges against him unlawful and at page 10 where the applicant raised the issue from time barred. He said it was wrong to bring those two issues in the submission because submission is not evidence he therefore prayed for the same to be disregarded and cited the case of *TUICO Mbeya Company Ltd & another (2005) TLR 41.*

He submitted further that issues raised in the award of the Commission for mediation and Arbitration (CMA) were three: -

i. *Whether the respondent had valid reasons for termination of the applicant's employment*

ii. *Whether such termination followed a fair procedure.*

iii. *To what relief parties are entitled. In determining the first issue the CMA guided by section 37 (1) (2) (a) (b) (i) (ii) (c) of the ELRA and Rule 9 (1) (3) (4) and (5) of the Rules.*

That the respondent had a valid and fair reason to justify termination of employment of applicants and the procedure were followed to terminate his employment. Mr. Merumba stated that the applicant had two permanent employment contracts as a result, he absconded from duty for about 181 days. The fact was confirmed by African Barick and admitted as Exhibit D5 at CMA. The applicant was given either three month notice of termination or 24 hours' notice with payment of one month in lieu of notice. The applicant opted for 24-hour notice and was paid one-month salary. He was informed of his charges where he confessed his charges as evidenced at paragraph 12.3.4.6 of the committee minutes.

In regard to duty bond Mr. Merumba submitted that the applicant was bound to sign the same. And since the termination was based on misconduct the applicant is not entitled to severance pay as per section 42 (3) of the ELRA. He stated that Section 40 (1) (a) (b) or (c) of ELRA come into play only when it is proved that termination was unfair. He therefore prayed for this application to be dismissed.

In rejoinder Mr. Sayi began by pointing the facts that were not answered by the respondent. He said that he did not introduce new facts, but instead he demonstrated impropriety, illegality and incorrectness of the disciplinary process and errors of the CMA award. He referred to paragraph 6 and 7 of his affidavit and paragraph 21 (b) and (g). He urged the court to look at the gist of paragraph 17. He further reiterated what he submitted in submission in chief.

I have gone through the record of the CMA and this Court duly considered the submissions of both parties with eyes of caution. I believe the issues for determination before this court are: -

i. Whether the respondent had valid reasons for terminating the applicant's employment

ii. Whether such termination followed fair procedures

Submitting on the first issue the applicant alleged that the employer had no valid and fair reasons depending on the seriousness of the offence to terminate the employment. The concept of a valid reason is well elaborated under Section 37 of ELRA which provides that: -

> *"Section 37 (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."***
>
> *[Emphasis is mine].*

The section is in line with Article 4 of the ILO Convention No. 158 which provides that: -

> *"The* ***employment of a worker shall not be terminated unless there is a valid reason*** *for such termination* ***connected with the capacity or conduct of the worker or*** *based on operational requirements of the undertaking establishment or service."*

In the instant matter, the record reveals that the applicant was employed as an Assistant Lecturer by the respondent. Again, as per exhibit D-5 letter from African Barrick shows that the applicant was also permanently employed as legal counsel by Barrick while he was still employed by the respondent. The situation led to the applicant to abscond from work for about 181 days. The fact which was not disputed by both parties. Under that circumstance I find that the respondent had a reasonable ground to terminate the applicant. As cited under section 37 of the ELRA above the employee's conduct may lead to termination. In this matter the applicant absconded himself from duty for 181 days. The applicant, by accepting Barrick contract implied that he had no any intention to continue working with the respondent. Therefore the respondent had no any other option than to terminate him.

The applicant argued that he was on study leave, however the record reveals that he was not officially permitted for the alleged leave since he did not sign the release bond as the requirement of the respondent. I have also noted the applicant's allegation that the respondent did not tender his employment contract with Barrick, in my view the contract was between the applicant and the Barrick, therefore the respondent was not in a position to access the said contract. As per exhibit D5 it is enough and sufficient evidence to prove that the applicant was employed by Barrick hence the applicant cannot refute that fact.

On the basis of the foregoing discussion this court finds no reason to fault with the Arbitrator's finding that the employer had a valid reason to terminate the application.

On the second issue whether such termination followed a fair procedure. Rule 47 (1) (11) of GN 168 of 2003 provides:

> *"Where the disciplined authority has served a charge or charges to an accused public servant in accordance with provision of regulation 14 of this regulation the inquiry shall*

commence not later than sixty days from the that the accused public servant with the charge or charges"

It is from the records that there were two charge sheets, the first charge sheet dated 08th January 2013 and this charge was substituted with the second charge sheet which contains two offences contrary to the first one and it was dated 15th March 2013, followed by the disciplinary hearing that was conducted on 12th April 2013. Therefore, the arbitrator misdirected himself by holding that the procedure was not in accordance with the time limit as required by law. By considering the date of first charge sheet instead of the second/substituted charge sheet which shows that the inquiry and the determination of the matter was conducted within 28 days as required by the law.

Basing on the above analysis, it is in my view that the respondent adhered all procedures for termination. I hereby quash and set aside the Arbitrator's finding that the respondent did not adhere to termination procedures. Thus, the award of two months' salary compensation is hereby quashed. Since the applicant was terminated for a fair reason and fair procedures, therefore he is not entitled to any remedies stipulated under section 41 of ELRA.

DATED and **DELIVERED** in **MWANZA** this 29th day of **MAY,** 2020

U. E. Madeha

JUDGE

29/5/2020