

**IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY
AT MWANZA
LABOUR REVISION NO. 100 OF 2018**

(Original from an Award of the Commission for Mediation and Arbitration at Geita dated 7th November, 2018 in Labour Dispute No. CMA/GTA/50/2017)

GEITA GOLD MINING LIMITED..... APPLICANT

VERSUS

JOACHIM KITWALA WALWA.....RESPONDENT

JUDGEMENT

18.3.2020 & 29.5.2020

U. E. Madeha, J

The applicant calls upon this court to examine and reverse the proceedings and the arbitration award made by the Commission for Mediation and Arbitration (herein CMA) at Mwanza in dispute No. CMA/GTA/50/2017, dated on 7/11/2018. The application is made under Section 91 (1) (a), 91 (2) (a), 91 (2) (b), 91 (2) (c), and 94 (1) (b) (i) of the Employment and Labour Relation Act, 2004 (Act No. 6 of 2004), Rules 24 (1), (2), (a), (b), (c), (d), (e), (f) and (3) (a), (b), (c), and (d) Rules 28 (1), 28 (1) 28 (1), (c), (d) and (e) of the Labour Court Rules, GN. 106/2007).

Briefly the background of the dispute is that: Joachim kitwala Walwa was employed by Geita Gold Mining Limited as the watchman on 7.5.2012.

Joachim failed to protect the employer's assets. He was terminated from employment for the failure to prevent theft. 39 sacks of carbon were stolen while the respondent was on duty as the Chief security guard. The respondent was accused of failing to discharge his duty diligently which resulted in attempted theft of loaded carbon belonging to the applicant company. The carbon attempted to be stolen was recovered on 30Th December 2016. The management of the Geita Gold Mining Limited received the information about the attempted theft, following the applicant's allegations the respondent was terminated from the employment in December 2016. The evidence on records shows that the respondent was the watchman of the Geita Gold Mining whereby he was charged with failing to fulfil his duties of protection of employer's property and causing 39 bags of carbon that were in the applicant's premises to be stolen. He failed to manage the assets of Geita Gold Mining Limited, as a chief security officer and caused 39 bags of carbon to be stolen. CMA felt that the termination was unlawful and the respondents deserve to be given Tshs. 36,516,434.45 salary payment as specified in the award as compensation for unlawful termination, severance pay, salary for the days worked and payment in lieu

of notice. It was the CMA's opinion that there were no valid reasons for the termination.

Mr. Nuhu Mkumbukwa, the learned advocate for the applicant submitted that, the termination was valid as the respondent was proved to be negligent, dishonest and attempted to steal the applicant's property due to his failure to discharge his duties or obligations vested in him by the employer. Cited the case of **Twiga Bancorp (T) Ltd Versus David Kanyika** Labour Revision No. 346 of 2013 where the term gross negligence was defined as *"a serious carelessness, a person is grossly negligent if he falls below the ordinary standard of care that one expects. It differs from the negligence in terms of degree."* The applicant, as the company security leader, he was obliged to protect the company's property. He was supposed to be diligence, but he conspired with others to the attempt stealing. Failure of due diligence amounted to the negligence. Negligence claim was sufficient ground for the termination. Cited the case of **Vedastus S. Ntulanyenka & 60 thers Versus Mohamed Trans Ltd, lab Rev. Shy** Revision No. 4 of 2014. In the High Court of Tanzania Labour Court Division, it was held that:

(iii) It is obvious, therefore, to say that, the applicant had contravened a rule or standards regulating conduct relating to

the employment. As the result of the misconduct contrary to rule 12 (1) (a) of the Employment and Labour Relation Act (Code of Good Practice) Rules GN No. 42 of 2007."

CCTV camera shows the movement of operators who are not allowed to move from place to place without permission, which resulted to the termination. Rule 32 of the labour institution (Mediation and arbitration guideline) and G.N No. 67 of 2007. This rule has set what to consider while awarding compensation for unlawful termination under section 40 of the employment and the labour relation Act. Act No. 6 of 2004. Severance pay means payment of an amount at least seven days basic wage for each completed year of continuous service up to the maximum of ten years. Granting more than years of service the arbitrator has made an apparent error which makes the award illegal. CMA was unjustifiable for being excessive and prayed the award to be set aside.

The respondent who was in charge and the leader of the security shift committed the serious gross negligence as he failed to supervise his subordinates during the whole night shift. He also conspired with another person to commit an attempt stealing. He rested for more than four hours and he failed to report the matter at the earliest opportunity.

Mr. Erick Katemi, the learned advocate for the respondent argued that; there were no valid reasons for the termination. The applicant did not prove on balance of probabilities that there were sufficient reasons to justify the respondent's termination of employment, cited the case of **Naftal Nyangi Nyakibari Versus Board of Trustees NSSF**, Lab MZA Revision No. 12 of 2014 Labour Court Digest Part 1, 2015 it was held that;

"It is established principal that for the termination of an employment to be considered fair, it should be based on valid reasons and fair procedure. In other words, there must be substantive fairness and procedural fairness of the termination of employment."

Cited the case of **Twiga Bancorp Limited Versus Zuhura Zidadu & Mwajuma Ally**, Labour Court at Dares Salaam, and Revision No. 206 of 2004. Labour Court Case Digest Part I, 2015 page 54 it was observed that:

"It is established principle that the applicant in order to succeed in proving negligence, he must prove that a duty of care was owed by the respondent, there was a breach of such duty of care, the breach caused damage was foreseeable, and

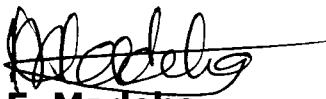
the duty to prove those elements lies upon the one who alleges.”

In viewing that, the respondent was unfairly terminated substantively and procedural. The employer (The applicant) did not have a valid reason to terminate the respondent as the applicant failed to prove the alleged offence. The applicant did not comply with the procedures in terminating the respondent as the employer failed to prove the occurrence of negligence. The applicant did not comply with the procedures for termination in terms of section 37 (2) (c) of the Employment and the Labour Relation Act, No. 6 of 2004 and Rule 13 of the Employment and Labour Relation Code of good practice G.N 42 of 2007 was not followed by the applicant in terminating the respondent. The applicant, hence the termination was not fair.

The applicant is ordered to reinstate the applicant's failure to do so the applicant should comply with the requirement of section 40 (1) of the Employment and the Labour Relation Act, Act No. 6 of 2004. The application is dismissed. I give no order as to costs.

DATED and **DELIVERED** at **MWANZA** this 29nd day of **May** 2020.




U. E. Madeha
Judge
29/5/2020