IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(TANGA DISTRICT REGISTRY)

AT TANGA

LABOUR REVISION NO. 7 OF 2019

(Arising from Labour Dispute No. CMA/TAN/16/2017, between Riverline Mtengela Mtinga v WS Insight Limited before Hon. U. N. Mpulla, Arbitrator, dated 13th March, 2019)

BETWEEN

WS INSIGHT LIMITED.....APPLICANT

AND

RIVERLINE MTENGELA MTINGA.....RESPONDENT

RULING

Date of Last Order:29/09/2021
Date of Ruling:15/10/2021

AGATHO, J.:

The Applicant was aggrieved by the decision of the CMA which held the that the Applicant unfairly terminated the Respondent from employment. The Applicant was to pay compensation for unfair termination, to pay for one month remuneration in lieu of notice, pay severance pat for two completed years of service, pay for one accrued annual leave and to issue certificate of service to the Respondent. Following that decision of CMA Arbitrator, the Applicant was dissatisfied and preferred to apply for revision before this Court. The Applicant prayed that the Court call for records on proceedings for Labour dispute CMA/TAN/16/2017 and revise the

proceedings, orders and award, and quash the orders and the award therein and or make such orders as it deems fit. And any other reliefs the Court may deem fit and just to grant.

The application for revision was supported by affidavit of Dickson Malaki. The Respondent filed her counter affidavit. After completion of pleadings, the Court ordered the parties to conduct hearing of the application by way of written submissions. The parties observed the schedule issued by the Court. To determine the application, the Court while examining the affidavits and the submissions of the parties raised the following issues:

Issues:-

(1) Whether the honourable Arbitration erred in law by failing to consider the evidence from the Applicant proving that the termination was justified and the proper procedure were followed.

(2) Whether the Arbitration's decision is illegal in that he misconstrued the provisions of Rule 12 (1) (a) and (b) of the employment and Labour Relations (Code of Good Practice) GN Number 42 of 2017.

(3) Whether the CMA decision was illegal for holding that the Respondent was prejudiced in hearing that no prejudice to the Respondent.

(4) Whether the CMA erred in law by awarding an excessing amount T.sh 4,070,769 without any legal basis.

The charge of abscondment was not proved as it was not in the minutes of disciplinary hearing meeting. This is seen on page 4 of CMA Ruling citing the testimony of DW2. The Applicant attachment R1, which is the alleged Respondent's letter confessing the misconduct and abscondment. It was not tendered before the trial CMA, and the said attachment R1 does not state how many days she absconded. The applicant claims that the Respondent absconded work for more than 5 days. As stated on page 5 of CMA ruling, these days are from 11/10/2017 to 25/10/2017. However, what was tendered at CMA are the minutes not R1 (the Respondent's letter).

Another question is whether the Respondent (Reveline) was paid her terminal benefit (marked as R5 at CMA, and now in the application for revision is R2). The Respondent (Riverline) in her testimony before CMA she admitted that she was given notice of disciplinary meeting. That is found on page 6 of CMA Ruling. The Respondent also admitted to have written exhibit R1. She claimed that she wrote the letter to be forgiven. This is seen on page 6 of CMA Ruling.

The Respondent admitted attending the disciplinary hearing. And she was given a right to appeal. The decision/outcome of disciplinary meeting she said it was read over to her, but she was not given a copy of exhibit R4.

The Respondent claimed she was recruited in Iringa and her domicile is Musoma. But before delving into that, and more critical we ask ourselves, were there procedural irregularities in the disciplinary meeting?

To start with reasons (fairness of reasons) for termination. This is a requirement found under Rules 9 and 12 of the Employment and Labour Relation Code of Good Practice, GN 42/2007. The CMA rightly noted that the reason given at the disciplinary hearing and the letter of termination are different. This is shown on page 7 of the CMA Ruling.

Moreover, and Contrary to Rules 13(4)(7)(8) and (10) of GN 41/2007, DW2 - Mr. Meshack claimed that the disciplinary meeting while she is not senior management meeting representative.

Even if the procedures were strictly adhered to would that change the fate (would that make fair termination unfair?). In **Nickson Alex V. Plan International [2005] LCCD 124** it was stated that since the Applicant had admitted to commit misconduct, a disciplinary hearing position would

have been the same due to admission even if the procedures were not followed as directed by the law.

Whether the Respondent had any mitigation after she was found guilty? It may be argued that her letter R1 should have been considered as mitigation even if it is said that she left after the disciplinary hearing.

Whether the termination procedures were fair? We have touched upon this question briefly hereinabove. The making of DW2 a chair of the disciplinary committee offended the law because the chair must be someone senior in the management.

Whether the Applicant company had any rule or standard in place that was used as the basis of employees' termination? The Applicant/employer's witnesses (DW1, DW2 and DW3) did not testify what employer's rule or policy or regulation in place that was breached by the employee (Respondent) and that were used by the employer as reasons for employee's termination of her employment. The disciplinary committee members DW1, DW2 and DW3 failed to cite any employer's policy setting standard or conduct that the employer should abide with. What are said to be reasons for termination as found in termination letter (R5) are reproduced in Swahili herein below:

(1) *Kulalamikiwa na msimamizi* (supervisor) Thomas *Mheza na kundi la askari wa kwenye gari kwa kuwatuhumu walikuletea chakula ulichohisi kuwa umewekewa sumu na ambapo ulitaka kuhamasisha askari wenzako kugoma kutumia chakula hicho.*

(2) *Kugoma kupangiwa kazi na kiongozi wako tarehe 09/10/2017 saa 12 asubuhi bila sababu zozote za msingi.*

(3) *Utoro kazini kuanzia tarehe 11/10/2017 hadi tarehe 27/10/2017.*

I agree with CMA Arbitrator that the reasons for termination must not only be valid but also be fair. The validity of reasons for termination are drawn from the laws generally and policy/staff regulations of a particular employer. The employer (Applicant) witnesses, DW1, DW2 and DW3 failed to mention any of employer's staff regulations or policy establishing standard behavior or orders or conduct the employees must abide with and the breach of which may lead to termination. It is trite law under Rule 12 (1) (a) and (b) of Employment and Labour Relations (Code of Good Practice) Rules (GN 42 of 2007). These are visible on pages 9 – 10 of CMA Ruling. Thus, when deciding on termination on allegation of misconduct the employer becomes a judge. And the rule provides I quote:

"Any employer arbitration or judge who is required to decide is to termination from misconduct is unfair shall consider?

(a) *Whether or not the employee continued a rule or standard relating to employment.*

(b) If the rule or standard was contravened, whether or not -

(i) it is reasonable;

(ii) it is clear and unambiguous;

(iii) the employee was aware of it;

(iv) it has been consistently applied by the employer and

(v) termination is an appropriate sanction for contravening"

I need not reemphasize that termination due to misconduct must be forded in law, regulation or policy established by the employer. In absence of such regulation or policy the termination lacks valid and fair reason.

Kutuhumu (allegation) and *Kuhisi* (sense) that the food was poisoned. This was not proved. Again, that she (Respondent) attempted to convince/persuade others to strike that too was not proved. I fully agree with CMA Arbitrator that there was no proof of company's regulations or policy which define the alleged misconducts. The letter written (exhibit R1) by the employee (Respondent) confessing the misconduct is not a replacement for the need of having the policy of regulations in place defining standards or behaviors that constitute misconduct and that could lead to termination from employment if breached. The CMA Arbitrator was right to hold (at page 10 – 11 of CMA Ruling) that the employer did not have any policy in place that define standard and procedure to handle misconducts, etc.

It is also apparent on page 11 – 12 of CMA Ruling and in exhibit R1 that the Respondent did not go to work because the supervisor did not assign her any task. Actually, she apologized for that. The fact she was not assigned any task by her supervisor Mr. Thomas was not rebutted by the employer. I have already held that alleged admission is not an excuse of not having regulation or citing the company's policy for handling misconducts.

Were the termination procedures fair? I have already stated that DW2 (Mr. Meshack John Kwimba) was not senior management position he did not qualify to be the chair of disciplinary committee. This contravened Rule 13 (4) of GN No. 42 of 2007 [see also CMA Ruling at page 12 – 13]. There are other irregularities mentioned in those pages of CMA Ruling I see no reason restate them.

As for salary dispute whether it is T.sh 150,000/= or 280,000/=. I agree with the CMA Arbitrator that the basic salary as shown on page 2 item 16 titled Remuneration in the exhibit R3 (which was C1 at CMA) clearly show that the basic salary is T.sh 280,000/=. The T.sh 150,000/= claimed by the employer to be the Respondent (employee) salary was for the person who is an probation. This is clear in exhibit R3 item 6. Actually the employee gross .....salary as per R3 (C1 as per CMA) on items 16 is T.sh 295,000/=.

There is also what is called taxable earnings T.sh 280,000/= and net pay before double time added 267,900/=. I should say the way item 16 of R3 on remuneration is confusing. But the gross monthly salary was 295,000/=. I thus hold that the CMA Arbitration was right in considering that employee's salary was 280,000/=.

The Applicant (employer) claims that it has paid the employee her terminal benefits and attached exhibit R2 (which was not tendered before the CMA). I thus proceed to expunge/ignore it. At this level I am dealing with evidence on record. The R1 seems to be sneaked into Court record without paying due regard to the fact that it was not tendered before trial CMA. I agree with CMA that the employee (Respondent) was not paid terminal benefits. Also, the CMA rightly observed that the employee did not tender any bank receipt to prove that the terminal dues/benefits were paid. [Page 14 of CMA ruling].

The termination letter exhibit R4 did not include one month's salary in lieu of notice, in the end I find no fault in the CMA Arbitrator's Ruling. The Applicant (employer) is ordered to implement the CMA Arbitrator's orders.

The application is therefore dismissed for lacking merit.

DATED at **TANGA** this 15th Day of October 2021.

U. J. AGATHO

JUDGE

15/10/2021

Date: **15/10/2021**

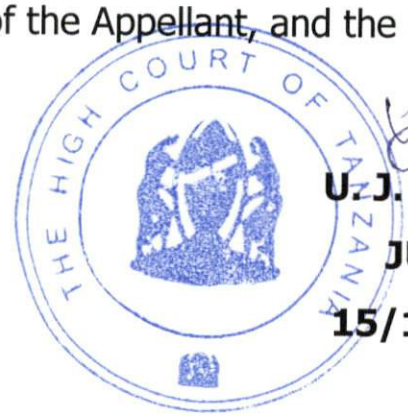
Coram: Hon. Agatho, J

Appellant: Present

Respondent: Present

B/C: Zayumba

Court: Judgment delivered on this 15th day of October, 2021 in the presence of the Appellant, and the Respondent.

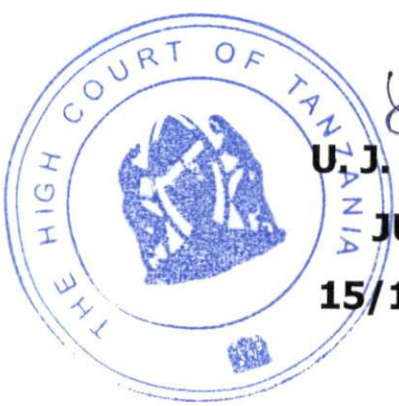


U. J. AGATHO

JUDGE

15/10/2021

Court: Right of Appeal fully explained.



U. J. AGATHO

JUDGE

15/10/2021