

**IN THE HIGH COURT OF TANZANIA  
LABOUR DIVISION**

**AT MWANZA**

**LABOUR REVISION No. 87 OF 2019**

**(Arising from the decision of the Commission for Mediation and Arbitration at  
Mwanza, Hon. Lucia Chrisantus Arbitrator dated 13/09/2019 in Dispute No.  
CMA/SHY/65/2018)**

**BETWEEN**

**CASPIAN LIMITED..... APPLICANT**

**VERSUS**

**CHACHA MWISE..... RESPONDENT**

**JUDGMENT**

25<sup>th</sup> Nov, 2020 & 11<sup>th</sup> February, 2021

**TIGANGA, J**

This judgment is in respect of an application for revision namely Labour Revision No.87 of 2019 filed by a notice of application and chamber summons supported by an affidavit of **Yusuph Haruna Kubeza**, who introduced himself as the principal Officer of the applicant who is conversant with the fact of the case.

The application was preferred under section 91(1)(a) and 94(1)(b)(i) of the Employment and Labour Relations Act No. 6 of 2004, and Rule



24(1), (2), & (3) and Rule 28 (1) (c), (d) and (e) of the Labour Court Rules, 2007 GN No. 106 of 2007 and any other enabling provisions of the law.

The applicant herein calls upon this court to grant the following orders;

- (i) To call for and examine the records, proceedings and award of of the CMA at Hon. Lucia Chrisantus, Arbitrator dated 13<sup>th</sup> September, 2019 in **Dispute No. CMA/SHY/65/2018** revise and set aside the award.
- (ii) Costs of this application be provided for,
- (iii) Any other relief and/or further Orders the Court may deem just to grant.

Briefly the background of this dispute as reflected in the record and affidavit sworn in support of the application is that the respondent was in 2003 employed by the applicant holding various positions until on 31<sup>st</sup> January 2018 when he was terminated as a Dump Truck Operator for misconducts that ranged from carelessness and failure to conserve safety regulations, damage and neglect of a company property to causing serious loss to the company.



Being aggrieved by the termination of employment, the respondent contested the termination of employment by referring the dispute before the Commission for Mediation and Arbitration for Shinyanga, which later on was transferred to Mwanza where it was heard and determined in the Dispute mentioned above.

In its award the CMA was satisfied that the respondent was unfairly terminated as there was no good ground for termination of his employment and that the damage caused to the machine was also contributed by the applicant.

Aggrieved by the said award, the applicant has now applied to this labour court to have the award revised, set aside and be quashed on the ground that;

- (a) The arbitrator erred in finding that the respondent was terminated without justifiable and fair reasons while there is a clear admission of the respondent that he actually committed the said misconduct and damaged the said property.
- (b) The arbitrator erred in proceedings ahead to rule out that the said termination was unfair without care that the commission of

the said misconduct was intolerable and termination from employment was the only remedy at the time,

- (c) The arbitrator erred in finding that the Applicant also contributed to the damage of the said property while on the other hand the respondent admitted that his machine had light on while reversing the same and that he was an employee with a long time experience in the work
- (d) The arbitrator erred in basing her decision on evidence which did not form part of proceedings,
- (e) The arbitrator erred in concluding that the termination was not fair as there was no valid notice/ warning prior to the commission of the misconduct
- (f) The arbitrator erred in awarding also payment of allowance in addition to respondent's salaries for the period between January –September 2019.

The application was opposed by the respondent by filing the Notice of opposition and the counter affidavit sworn by Chacha Mwise, the respondent, who was represented by Mr. Alhaj Majogoro, learned Advocate. In the counter affidavit, the respondent deposed that the



Commission was right in its findings after considering all the evidence and relevant factors as indicated in the award.

At the hearing of this application Mr. James Njelwa, learned counsel, represented and argued the application for the applicant, while Mr. Alhaj Majogoro, represented and argued the application for the respondent.

By the order of this court the hearing of the application was by way of written submissions, Mr. Njelwa, Advocate started by adopting the affidavit sworn in support of the application, and referred this court to paragraph 5 of the affidavit which basically indicates the errors committed by the commission, which is the base of wanting this court to revise the award.

Mr. Njelwa reminded the court that the CMA framed three issues, namely whether the respondent termination was procedurally fair, whether the reasons for termination were valid and what relief were the parties entitled. However according to him, the commission, in the course of determining the dispute, did not deal with the first issue rather it concentrated much on the second issue and concluded that the termination was not valid and so it was unfair. The other issue like the validity of the warnings, the notices etc, which were procedural, are not to be considered

in this application as they don't form the basis of the decision as observed at page 9 of the proceedings. What is relevant according to him in the circumstances is whether the reasons for termination were valid for which his answer is in the affirmative.

Mr. Njelwa submitted that the reasons for termination as per the evidence of DW1, at page 13 of the proceedings, which was supported by the evidence of the respondent at page 7 of the proceedings was damaging the employers property. He submitted that by the respondent admission, it means the reasons for termination are not contested; the next issue is whether that reason was valid warranting termination of the respondent employment?

In resolving this issue, Mr, Njelwa, made reference to section 37(2)(a) of the Employment and Labour Relations Act, No. 4 of 2004, which provides that termination of employment by the employer is unfair if the employer fails to prove that the reasons for termination were valid. He submitted therefore that the commission was supposed to ask itself as to whether the employer proved that the reasons for termination were valid and not otherwise. Mr. Njelwa submitted that the employer proved that, as he tendered exhibit D1, the employment contract as reflected at page 13



of the proceedings and said that under section 10 (1)(d) of the contract it is clearly and categorically provided that, either party may terminate the contract with one month written notice or payment of one month's salary in lieu of notice. The employer reserves the right to terminate without notice in the following circumstances, *"mismanagement of or damage to employer/client property"*.

He submitted that since the reasons for termination was the damage of the property of employer, the reason constitutes the valid ground for termination of employment and deciding otherwise the commission was in error of law as such the award was improperly procured as per the provision of section 91(2)(b) of the Employment and Labour Relations Act cited above.

Mr. Njelwa went further that the decision of the arbitrator at page 6 relied on and was influenced in its decision by the evidence that, there was no CCTV camera on the site to show the extent of the damages of the machine. He submitted that the said evidence was not part of the record in the CMA proceedings. Therefore it was not proper for the commission to rely on the evidence of that kind in its decision.

He also submitted that the total of Tshs.1,822,500/=being a salary of January to September 2019, and other allowances which were not specified was granted in error; for section 43(1) of the Employment and Labour Relations Act (supra) provides that upon termination the employee is not entitled to house and medical allowances and therefore awarding them was irregular. He asked in the end that the court revise and declare the termination to be valid.

The respondent in his reply submitted through Mr. Alhaji Majogoro, learned Advocate that he cited GN No. 42 of 2007 on the guideline of the disciplinary incapacity and incompatibility policy procedure on item 9(2) general which state that written warning and final warning should be kept on an employee's personal file and should remain operative for six months.

He said the warning said by DW1 inline with above provision has no any relevance in termination of employment of the respondent. He submitted that there is evidence of DW1 which was to the effect that the light was not properly working on that date and that since the duty to fix it was of the applicant then he contributed to the damage which occurred as the damage happened because the light which was assisting the operators was not working.



Further to that, Mr. Majogoro submitted that the extent of damages was important in determining the proper action to be taken against the respondent. He submitted that in this case the extent of damage was not ascertained by the evidence of the applicant. The respondent in his evidence said the damage was very small. That is why the arbitrator said that had the CCTV camera footage been produced that would have been the only way to ascertain the extent of damages.

He also submitted that section 40(1)(a) of the ELRA empowers the arbitrator to order reinstatement, and that the said order entails the payments or remuneration during the period that the employee was absent from work, and that according to section 4 of the Act, remunerations means " a total value of all payment in money or kind made or owing to an employee arising from the employment of that employee."

That basing on the above definition, the arbitrator was proper to award the said payments because they all form remuneration as far as the definition is concerned. He in the end asked the application to be dismissed with costs.

In rejoinder, the counsel for the applicant said the alleged contribution cannot exonerate the respondent from liability. He referred me

at page 22 of the proceedings, he submitted that, what the respondent did was against the rule because that was not a proper response to the red light. This means he did it negligently. Mr. Njelwa insisted that, under section 10(1)(d) of exhibit D1 the only remedy was termination of employment.

Now having summarized at length the contents of the documents filed in support and opposition of this application, I find that, from the proceedings there is no dispute that the respondent was terminated following the fair procedure but what was in question is whether the reasons for termination was fair and valid?

From the record, both parties agree that the respondent was terminated for damaging the property of applicant. The property so damaged is a Dump Truck machine which he was operating. The circumstances in which he damaged it, according to the evidence on record, is that he failed to stop when the red light stopped him; instead he reversed thereby causing damages to the machine he was operating. That being the case, then that cannot be taken to be intentional or malicious, it is purely negligent.



The respondent admits to have caused damage negligently, but he contends that the damage is very small and was contributed by the applicant for not fixing the light at the area. The Arbitrator relying on the provision of Rule 12(2) of the GN No.42 of 2007 held that the first offence of the employee is not sufficient to be based on to terminate the contract of employment of the employee unless it is grave to the extent of causing the employment relationship to be difficult to proceed. The arbitrator was satisfied that the respondent was the first offender and it was not proved that the offence was of the grave nature to warrant termination as the only punishment.

From the evidence, there is no dispute that section 10.1(d) of the contract of employment provides the employer with powers to terminate the employment upon the employee's mismanagement or damage of the employer or client's property. In this case, the termination of the employment of the respondent was based on this section of the contract. Reading it as it is, any damages to the property regardless the magnitude of damage, constitutes the ground of termination.

However, the matter of termination of employment is regulated by section 37 of the Employment and Labour Relations Act (supra). For easy reference the same is hereby reproduced hereunder.

*"(1) It shall be unlawful for an employer to terminate the employment of an employee unfairly.*

*(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 if it-*

*(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.*

*(3) N/A*

*(4) In deciding whether a termination by an employer is fair, an employer, arbitrator or Labour Court shall take into account any*

***Code of Good Practice published under section 99.***

*(5) N/A"*[emphasis supplied]

The code of good practice referred to in subsection 4 of section 37 is the Employment and Labour Relations (Code of Good Practice) G.N. No. 42 of 2007 and the relevant provision which was also relied upon by the



arbitrator is Rule 12.-(1) of the Employment and Labour Relations (Code of Good Practice) G.N. No. 42 of 2007 which provides that;

*"Any employer, arbitrator or judge who is required to decide as to whether termination for misconduct is unfair shall consider-*

*(a) whether or not the employee contravened a rule or standard regulating conduct 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, or could reasonably be expected to have been aware of it;*

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

*(v) termination is an appropriate sanction for contravening it.*

*(2) First offence of an employee shall not justify termination unless it is proved that **the misconduct is so serious that it makes a continued employment relationship intolerable.***

*(3) The acts which may justify termination are;*

*(a) gross dishonesty;*

***(b) willful damage to property;***

*(c) willful 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*

*(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.***

*(5) The employer shall apply the sanction of termination consistently with the way in which it has been applied to the same and other employees in the past, and consistently as between two or more employees who commit same misconduct." [Emphasis supplied]*

From these provisions, it is glaringly clear that, section 37 of the Employment and Labour Relations Act, (supra), must be read together with the code of Good Practice made under section 99 of the Employment and Labour Relations Act. These two laws read together the following are the clear directives to be complied with before an action of termination is done by the employer and upheld by Arbitrator or the Court that;



- (i) The first offence/misconduct of an employee shall not justify termination,
- (ii) The termination may only base on the first offence/misconduct if it is proved that the misconduct is so serious that it makes a continued employment relationship intolerable.
- (iii) If that offence/misconduct relates to damage to the property of employer then it must be established that the act was done willfully.
- (iv) Taking into account the nature of the job and the circumstances in which it occurred that misconduct is so serious to endanger health and safety, and there is a likelihood of repetition;
- (v) Looking at the circumstances of the employee such as the employee's employment record, length of service, previous disciplinary record and personal circumstances the misconducts merits termination.

In this case, the record shows that the misconduct committed by the respondent was the first. There was no evidence led to prove the

magnitude of damage, which burden was on the shoulder of the employer, there is no evidence led to prove to what extent was the machine damaged and the costs involved for making it good again, which facts would have proved the seriousness of the damages to make a continued employment relationship intolerable. The evidence is clear that the damage to the property of employer was due to the negligent act as opposed to the willful act of the respondent.

Further to that, taking into account the nature of the job and the circumstances in which the misconduct occurred there is no proving that the said misconduct was so serious to endanger health and safety, and there is a likelihood of repetition. Last it has been proved that the respondent had worked consistently for 15 years for the applicant, and without any record of previous disciplinary records proves that by all necessary implications, the record of the employee was good and has worked for the applicant for long. In the circumstances termination cannot be appropriate sanction.

That said I find the application to be devoid of merits, it is hereby dismissed for want of merit. The award issued by the arbitrator is hereby upheld.



It is accordingly ordered.

**DATED at MWANZA** this 11<sup>th</sup> day of February, 2021



**J. C. Tiganga**

Judge

11/02/2021

Judgment delivered in open chambers in the absence of the parties and their respective Advocates but with instruction to the bench clerk to inform them the results and supply them with the copies of judgment.



**J. C. TIGANGA**

**JUDGE**

**11/02/2021**

