IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

LABOUR REVISION NO. 40 OF 2020

(Arising from Labour Dispute No. CMA/KLM/ARB/37/2020)

KILIMANJARO PLANTATION LIMITED.....APPLICANT

VERSUS

NICOLAUS NGOWI..... RESPONDENT

JUDGEMENT

MUTUNGI .J.

The applicant, Kilimanjaro Plantation Limited filed this application pursuant to Rule 24 (1) (2) (a) (b) (c) (d) (e) and (f) , 24(3)(a)(b)(c)(d) of the Labour Court Rules, GN 106/2007 and Rule 28(1)(c)(d) and (e) Labour Court Rules, GN 106/2007 read together with section 91(1)(a) and 91(2)(c) of the Employment and Labour Relations Act, cap 366 R.E 2019. The Application is supported by an affidavit of Patricia Eric learned advocate for the Applicant.

The applicant in the chamber summons prayed for the orders that: -

(a) The Award delivered by Honourable G. P. Migire on

the 11th day of September 2020 be revised and set aside by this Honourable Court.

(b) Any other or further orders as the court may deem fit.

(c) Costs be provided for.

The genesis of this revision was an application preferred by the respondent after termination of his employment. It all started when the Respondent was supposed to sign a new contract following the order from the Vice president of the United Republic to make sure all employees at the company be provided with employment contracts instead of offers of employment. When all was ready and the respondent called to sign the new contract he refused to do so. Following his refusal to sign the employment contract he was terminated. The respondent lodged his complaint with the CMA. The Arbitrator found the respondent was terminated unfairly. Aggrieved by the Arbitral Award, the applicant has appealed to this court on the grounds stated in the Corresponding Affidavit. The major grievance being that: -

(a) The applicant had good reasons to terminate the respondent's employment after multiple disciplinary issues of insubordination.

(b) Signing a contract with detailed defined terms and rights rather than an offer letter was inevitable requirement after the Applicant's employees

complained of having employment offer letters and not contracts to the Vice President Hon. Samia Suluhu Hassan and the Applicant being ordered to provide such contracts to all its employees.

(c) The Respondent has never pointed his areas of dissatisfaction on receiving the employment contract whether to the applicant or before the CMA.

(d) The Respondent did not only report to work earlier than the required office statutory departure times set by the Applicant thus wasting the Applicant's efficient working time by two hours.

(e) The Respondent's appraisal was mandatory to all employees and was not to be appraised as Supervisor but as the Applicant's employee.

(f) The Respondent was given ample time to defend himself on the alleged disciplinary issues but deliberately opted not to defend himself.

(g) The disciplinary hearing was a necessary due process and was part of the Respondent due process of termination.

(h) The procedure for termination was followed.

At the hearing of this application, the Applicant enjoyed the service of Patricia Eric learned advocate while the respondent appeared in person with representation of Mr. Hatib and the rival sides agreed to proceed by way of written submissions.

The advocate for the Applicant grouped the grounds for revision into four issues **first**, whether the applicant had good reasons for termination; **second**, whether the applicant followed proper procedure in terminating the respondent's employment; **third,** whether the award of Hon. Arbitrator G. P. Migire was irregular and **fourth**, what reliefs are entitled to the parties.

Submitting on the issue of reasons for termination, the learned advocate for the Applicant argued, the grounds for termination were refusal by respondent to sign a new contract and failure to give reasons for not doing so, refusal to attend performance appraisal meetings, refusal to adjust on the change of working hours and gross insubordination to his supervisors.

On the refusal to sign the new contract and failure to issue reasons for refusal, the learned advocate stated, it was the order by the Vice President of the United Republic to sign new contracts after finding out during her visits that, the employees had only offers of contract. Abiding to the order, the Applicant had to issue new contracts. All the employees had to sign, but to their surprise the Respondent being one of the long standing employees refused to sign the same and refused to give reasons for such refusal despite several remainders in writing. The counsel referred the court to **section 15(4) of The ELRA, CAP**

366 R.E 2019 which requires the employer to notify the employee if there is any change in the particulars of the contract. This was exactly what was done to the Respondent both orally and through letters.

The advocate further submitted, the said new contract had no changes which would go to the root of the old contract and the rest of the contents were as per **G.N 42 of 2007 Employment Labour Relations** (Code of Good Practice). It was contended that the Hon. Arbitrator failed to scrutinize the evidence, and ended up deciding that the respondent was being subjected to another contract with new terms and conditions. More so all the procedures for the same were followed together with giving him ample time to consult the Applicant before signing.

On the issue of refusal to attend the performance appraisal meeting, the advocate submitted, the respondent refused to attend the appraisal exercise on allegation that, he was being appraised for the work of a supervisor while he was assigned the work of slashing grass. Much as it is true he was shifted but this was because the respondent was affected by chemicals used in the farm. So, the refusal to be appraised was premature and contrary to his job description. The advocate submitted that the respondent was supposed to undergo the performance appraisal and wait for results, if dissatisfied could proceed to challenge the outcome if he so wished.

On the ground of refusal to adjust to working hours, the advocate for the Applicant submitted, such change was due to the rainy season (climate change). In that regard coming within the normal hours would mean, the employer would lose 2hours to the respondent who would be idle. The coffee would not be able to dry as there will be no sun in the early hours. The advocate referred this court to **section 3(1) of ELRA** that, the principal objects of the Act is to promote economic development through efficiency geared at high productivity. An employee had to work in order to achieve this objective. The Applicant had worked for about 10 years, for that reason refusing to adjust to working hours amounted to misconduct.

The learned advocate also referred this court to **section 19 of ELRA** which provides for the working hours and submitted the change in hours was still in conformity with the law which was Sub B of the Employment and Labour Relations Act. The advocate submitted further the Arbitrator misguided himself in applying the definitive time in working hours contrary to what is required in the private sector. Further, the Arbitrator failed to note, the respondent attended at work earlier than the appointed time (7:00 a.m.) hence no one was around at such time to allocate him tasks and check on the departure time, resulting to losses.

On the reason of gross insubordination, the counsel for the Applicant submitted that, when the respondent was asked as to why he refused to report at work as requested, he shouted at them by saying; ***"wewe sio msimamizi wangu, naweza kufanya kazi sehemu yoyote"*** and ***"Wewe ni nani katika Serikali hii ya Magufuli".*** This was arrogance of the highest order. The respondent could in the alternative report to the administration or file a labour complaint. The learned advocate referred the court to the case of **Tatu S. Mohamed** and **Aisha B. Ramadhan vs. A3 Institute of Professional Studies Labour Revision No 308 of 2019 HC**, labour division unreported which quoted the case of **Sylvania Metals (Pty) Ltd vs Mello N. Oand Others (JA83/2015)(2016) ZALAC 52** Z. G. Muruke .J. laying down the definition of the word Insubordination.

On the second issue on whether the Applicant followed proper procedure in terminating the Respondent's employment, the learned advocate analyzed the sequence of events followed by the applicant before terminating the respondent. First, she wrote him a letter to show cause why disciplinary action should not be taken against him, the letter which he admitted to have received. 12 days later he was invited to attend the disciplinary hearing meeting, the meeting which the respondent attended but refused to proceed on the ground that he had no trust with the disciplinary committee. The meeting was postponed and the labour officer advised members be changed but Elia

Ndogo and Shamiuna Shoo were not changed as they were vital witnesses in the dispute.

Despite such changes, the respondent still refused to attend on the ground that, he did not ask the employer to change the faces of the members. He then demanded the matter be taken to the court of law. In such a situation the Applicant had to proceed with the disciplinary meeting and receive evidence. Ultimately the respondent was terminated and dully notified on his right to appeal within 5 days. The learned advocate further submitted that **Rule 13 of GN 42 of 2007** provides for fairness of the procedure during termination, and the applicant had far and wide provided the respondent a fair ground which he chose to abuse.

She further submitted that, the Employment and Labour Relations Act provides no exception to conduct disciplinary hearing, and **Rule 13(6) of G.N 42 OF 2007** allows the employer to proceed with the hearing when the employee refuses to attend the meeting unreasonably. She quoted the maxim *vigilantibus Et Non Dormientibus Jura Subveniunt* which means "the law assists those that are vigilant with their rights and not those who sleep thereupon". In this case the respondent slept on his rights.

The Applicant's advocate submitting on the issue of failure to conduct investigation as argued by the Arbitrator that had the

applicant conducted investigation, he could have found the Respondent had already been employed on permanent basis. The counsel argued that in her view through Exhibit A1 which was requesting respondent to read and ask questions where he did not understand, was an objective investigation and the same applies to Exhibit A2 and A3 which was the remainder to respondent on the contract sent to him. Also Exhibit A5 which was demanding respondent to explain in writing within 3 days why disciplinary measures should not be taken against him was also an objective investigation. Conclusively, the learned advocate submitted, the Arbitrator misguided himself in failing to appreciate the evidence that, the Applicant had a good ground to conduct an exparte disciplinary hearing which was necessary before terminating the respondent.

Submitting on the last issue on whether the award of Arbitrator was irregular; the learned advocate submitted that PW2 was not a party to the dispute but the Arbitrator in his award referred to PW2 who happened to be the respondent's wife dully retrenched from employment. In view thereof the termination had an impact on the respondent's family stability. The learned advocated lamented this was a new issue which was not raised during the hearing and the applicant was not given an opportunity to defend on that. The counsel further elaborated that, the Arbitrator misguided himself in the Award,

basing his decision out of sympathy on a party who was not part of the Arbitration Proceedings.

In light of her submission the counsel summed up by praying the court to revise and set aside the Award and provide for cost of this revision.

In reply to this submission the Respondent submitted, the reasons for not signing the new contract are that the new contract had new conditions compared to the old contract. The Respondent quoted some paragraphs in the contract such as; *"Mwajiri atapangiwa kufanya kazi sehemu yoyote ya shamba ama Idara yoyote na kufanya kazi yoyote atakayopangiwa kuifanya isipokuwa kunyunyuzia dawa"*. This definitely meant he had to carry out all the jobs at the company.

Also the sentence like *"Mwajiriwa aliajiriwa kama msimamizi wa shamba chini ya Mkurugenzi wa shamba/Meneja uzalishaji na au Meneja wa kitengo* ***ama Idara nyingine zozote ndani ya KPL"*** would need more clarification. Also, the phrase *"au mahali pengine ambapo mwajiri ataona patamfaa mfanyakazi kupangwa"* needed further elaboration. The Respondent submitted the problem is not the new contract but the content of the new contract. Be as it may, he had already in his possession a proper contract prepared before the Vice President's visit.

The Respondent further submitted, the harassments started when he was requesting to be taken back to his normal duties of a supervisor from slashing grass. The reason being that he had already recovered from the chemical infection. Another reason was that after he was involved in an accident at work, it was only the applicant paid compensation, after he had claimed for compensation through the workman's compensation fund.

On the reason of refusal to attend the performance appraisal meeting, the Respondent submitted, he was supposed to be appraised on the position he held (supervisor) while he was doing the work of slashing grass. All that they wanted was to get rid of him. Life became very difficult, he received letters from all corners and from everyone. To avoid confusing himself he decided to go on with his normal duties.

Reacting to the reason of refusal to adjust on the change of working hours, the respondent submitted due to his refusal to sign the new contract, they also raised the issue of changing the hours from 08:00 instead of 07:00 claiming that it because of the sunshine. He submitted the changes were geared at harassing him.

Reacting to the reason of insubordination, the respondent submitted, the truth of the matter is Mr Elia Ndogo (a farm director) and Richard Kursel (a farm Manager) were the ones

who shouted at him, forcing him to sign the new contract and the changed working hours. In his settled view these were purposively trying to get him to reply so that he is charged for insubordination.

On the second issue as to whether the applicant followed proper procedure in terminating the respondent's employment, he submitted that he attended all the disciplinary meetings only to find the members were those who harassed him and for that they could not be fair. He requested the matter be tried in a labour commission or court who could translate the terms of the new contract. He put down his request in writing but nothing changed.

On the issue whether the award of the Hon. Arbitrator was irregular, the respondent submitted that, the burning issue was his failure to sign the new contract. All that cropped up latter was a result of forcing him to sign the new contract. The Arbitrator did observe the same hence the Award was in the right track with no misconceptions.

On the complaint that PW2 was not a party to the dispute, he submitted PW2 was not a party to the dispute but she was called at the CMA as his witness. Further she was an employee of the Applicant at the time of the dispute. In that regard she was well acquitted with the facts of the dispute.

The Respondent concluded by praying, this court does strike out the revision application and uphold the Arbitrator's Award.

I have gone through the CMA records and submissions by the parties and I find the issues for determination are: -

1. *Whether there were grounds for termination of the Respondent's employment.*
2. *Whether the procedure to effect termination was followed?*

To answer this I refer to section 37 of the Employment and Labour Relation Act which I wish to quote: -

> *"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."*

According to **Rule 12(3) of Employment and Labour Relations Code of Good Practice GN No. 42/200**, the acts that may justify termination are: -

(a) Gross dishonest

(b) Wilful damage to properly

(c) Wilful endangering the safety of others

(d) Gross negligence

(e) Assault on a co-employee, supplier, customer, or member of the family of and any person associated with, the employer and

(f) Gross insubordination.

Having perused through the Arbitration records, it is obvious that the reasons for termination were failure of the respondent to sign a new contract, refusal to adhere to changes of the working hours, refusal to attend the appraisal meetings and disrespect of the respondent's superiors.

After reading the proceedings I find the Arbitrator failed to note that, the burden of proof lies with the employer who is required to prove the reasons for termination on the balance of probabilities as per **Rule 9 (3) Employment and Labour Relations (Code of Good Practice) GN. 42/2007**, which reads that: "*...the burden of proof lies with the employer but it is sufficient for the employer to prove the reason on balance of probabilities....*"

What happened then when the Respondent was called upon to sign the new contract?

I have perused the exhibits produced during the Arbitration proceedings A2-Letter to request Respondent to sign the contract it reads: -

> *"Hivyo unaombwa kusaini mkataba pendekezwa ndani ya siku 7 baada ya kupokea barua hii. Kama unahitaji maelezo zaidi kuhusu mkataba tafadhali fika ofisi ya HR katika kipindi kilichokubaliwa vinginevyo hatua zaidi zitachukuliwa."*

Exhibit A3 which is the remainder letter to sign the contract

> *"Ila nasikitika kwamba mpaka sasa hujasaini mkataba huo na* ***hujawasilisha maelezo yoyote kimaandishi ya kushindwa kusaini*** *mkataba huo''(emphasis added)*

Exhibit A5 the letter to explain why disciplinary action should not be taken against the Respondent;

> *"Tarehe 14.11.2019 ulipokea barua toka ofisi ya HR ikikuhitaji kusaini mkataba wa ajira ndani ya siku saba baada ya kupokea barua hiyo, ila hukufanya hivyo. Tarehe 26.11.2019 uliitwa ofisi ya HR na kupatiwa barua iliyokuwa ikikukumbusha kwamba unatakiwa kusaini mkataba wa ajira* ***ulisoma barua hiyo na kisha kukataa kusaini kwamba umepokea na kumrudishia HR (Shamiuna Shoo) barua hiyo***

huku ukitoa maneno ya ukali na ya dharau kwa Afisa mwajiri (Shamiuna Shoo). *Emphasis added*

But according to the applicant the respondent did not reply nor did he face the management to raise his grievances if any. The applicant had no option but to proceed with disciplinary actions. Exhibit A6 the invitation letter to attend disciplinary hearing shows that, the Respondent was given an opportunity to attend with his representative and to ask any question if he so wished or through his representative. Exhibit A7 clearly revealed the refusal for disciplinary hearing by the respondent which shows that the respondent attended the meeting and after introduction, the respondent stated that he was not ready for the disciplinary hearing. The letter required the respondent to explain why he didn't want the disciplinary hearing. The letter which the Respondent replied to by stating that he had no trust with the committee and wanted the matter taken to the court.

Following the foregoing sequence of events from the time when the applicant was supposed to sign the new contract and refused, to the time when he refused to attend the disciplinary meeting despite the fact that they changed members and left the witnesses, it depicts the respondent's ill motive and gross insubordination.

There was the question of attending the performance appraisal meetings where the respondent refused to attend on the reason, he was at the time working in a different position. In the settled view of the court, this is the very reason he should have attended the appraisal meetings and waited for the results, so as to have a starting point of any complaints in the event he was not satisfied. Simply absenting himself connotes some degree of insubordination subject of the disciplinary committee's decision. More so the appraisal exercise was part of the applicant's policy well in the knowledge of the respondent.

The applicant was very bitter with the respondent's failure to align himself with the new working hours. The court has noted that, the respondent through his whims decided to follow his own working hours claiming, he was getting orders from all angles. This does not make any sense that the remedy is for an employee to report during working hours which he supposedly suited him. The employer was at liberty to change the times to suit his production activities. Definitely there was an element of insubordination.

In the case of **GSM Tanzania limited vs. Iddi M. Kitambi (Labour Revision no 197/2019**, this court had this to say: -

> *"Discipline at work is very essential for orderly administration of day to day operations at work*

place. To the contrary, affects productivity and advancement of industries and economy of the country at large".

Everything goes with order and procedure, there is nothing the respondent could have done to jump the procedures put in place or the several attempts to get him to consult the management. If at all his complaint is due to the changes of terms of contract, he would have been in a better place to attend the disciplinary meetings and raise his voice therein.

All in all the applicant had grounds to terminate the respondent.

On the issue of whether the procedures to effect termination were followed; the parties submitted on the issue of failure to investigate in order to know if there are reasons to conduct a disciplinary hearing. For this the Arbitrator had this to say: -

"Had the respondent conducted objective investigation, he could have found out that Mr Ngowi was already employed into permanent service and new contract was unnecessary to him….it means that investigation is mandatory prerequisite to disciplinary hearing."

The Applicant submitted that through exhibit A1 which was letter requesting Respondent to sign, A2 and A3 reminding

Respondent about the contract sent to him and A5 demanding the respondent to explain why disciplinary measures should not be taken against him were objective investigations.

The sub issue is whether the procedures laid down by Rule 13 of GN no. 42/2007 are mandatory requirements and should be used as checklist. To answer this, I wish to quote the words of this court in the case of **Sharifa Ahmed vs. Tanzania Road Haulage 1980 Ltd, labour Division, DSM Revision No. 299 of 2014.**

> *"What is important is not the application of the code of checklist fashion, rather to ensure that the process used adhered to basics of a fair hearing in the labour context depending on circumstances of the parties, so as to ensure that act to terminate is not reached arbitrarily,"*

Also the ruling of the Court of Appeal in the case of **Victor Bushiri & 133 Others vs. AMI(t) ltd Civil Application No. 64/2000 (unreported)** where Kisanga (JA) (as he then was) held that the use of the word shall in a provision does not always make the provision mandatory, it will depend on the circumstance of each case.

Basing on the circumstances of the dispute and that the respondent had already refused to sign the new contract without assigning reasons and refusal to attend the

performance appraisal meeting, the reminder letter and demand letter issued to him were enough to amount to investigation as submitted by the Applicant, hence the applicant had no option, other than to carry out the disciplinary meeting and to terminate the respondent.

The two sides did make reference to the observation made by the Arbitrator of referring to PW2 apparently the respondent's wife. This need not task the mind of the court, in that indeed the Arbitrator had introduced extraneous issues. PW2's retrenchment a month before the respondent's termination had nothing to do with the allegations levelled against the respondent by the applicant. These were quite distinct and the applicant could not just sit and watch the respondent mis behaving for fear of impacting his family's stability.

All said and done, I differ with the findings of the Hon. Arbitrator and I find that the Respondent was terminated fairly and for that I proceed to revise and set aside the award delivered by Hon G. P. Migire .J. on 11th September, 2020 as prayed in this revision application.

B. R. MUTUNGI
JUDGE
18/3/2021

Judgment read this day of 18/3/2021 in presence of Mr. Baraka Tenga/Lilian Mushi holding brief for Patricia Erick for the

applicant, the respondent in person represented by Mr. Hatib Losiando.

B. R. MUTUNGI
JUDGE
18/3/3/2021

RIGHT OF APPEAL EXPLAINED.

B. R. MUTUNGI
JUDGE
18/3/3/2021