IN THE HIGH COURT OF THE UNITED REPUBLIC TANZANIA

[LABOUR DIVISION]

AT ARUSHA

REVISION APPLICATION NO. 78 OF 2018

(C/F Labour Dispute No. CMA/ARS/ARB/188/2017)

TRUCKLINE LIMITED ..... APPLICANT

Versus

RAJABU NOMBO KOROSI ..... RESPONDENT

JUDGMENT

23rd February & 23rd March, 2021

Masara, J.

The Respondent, **Rajabu Nombo Korosi,** was employed by the Applicant, **Truckline Limited,** on 7/1/2004 as a car mechanics. His employment contract was terminated by his employer on 4/7/2017 on various charges. The charges range from misconduct, going against management's decision, demanding extra allowance, using abusive language against management, threatening the management and that he left the driver at Holili without informing him.

The Respondent was summoned in a disciplinary hearing that was conducted on 5/6/2017. He denied all the accusations against him. The disciplinary committee found him guilty of the charges and recommended that the Respondent's employment be terminated. He was accordingly terminated. The Respondent was aggrieved. He filed a labour dispute in the Commission for Mediation and Arbitration for Arusha (CMA) vide CMA/ARS/ARB/188/2017. After hearing the parties, the CMA made a finding that the Respondent's termination was both substantively and procedurally unfair. It ordered the Applicant to pay him compensation as follows: twelve months salary at the tune of TZS 4,200,000/=, severance

pay TZS 942,308, one month notice TZS 350,000/= and annual leave TZS 350,000/=, making it a total of TZS 6,142,308/=. The Applicant was aggrieved. They have preferred this revision seeking to reverse the CMA award.

The application is supported by an affidavit sworn by Mr. Arvind Singh Boghal, a Principal officer of the Applicant. The application was contested by a counter affidavit affirmed by the Respondent himself. The Applicant in this application was represented by Mr. Qamara A. Peter, learned advocate while the Respondent was represented by Mr. Frank L. Maganga, Personal Representative. The application was heard by way of filing written submissions.

Submitting in support of the application, Mr. Qamara contended that the Respondent was terminated after investigation was conducted and hearing was scheduled. Since the driver was asked to submit his report in writing, Mr. Qamara was of the view that investigation was done before hearing. The Respondent was summoned and appeared before the committee for hearing but he refused to sign the hearing form while all the members who attended the hearing signed. He submitted that the Respondent did not deny the allegations against him. He had a duty to prove his evidence in the committee and not before the CMA. According to Mr. Qamara, the Applicant proved that there were offences committed by the Respondent as reflected in exhibit D3 which is a notice to attend hearing. The learned counsel further stated that offences committed by the Respondent contravened Rule 12 of the Employment and Labour Relations (Code of Good Practice) G.N No. 42 of 2007.

On the procedure, Mr. Qamara submitted that the procedure was adhered to. First, the Applicant conducted investigation by receiving the driver's report (exhibit D3), the Respondent was charged (exhibit D2), then he was issued with notice to attend hearing and hearing was done as per exhibit D4. That the Respondent was afforded the right to defend himself, since he was given notice to attend hearing on 2/6/2017 and hearing was conducted on 5/6/2017, which is more than 48 hours as provided by law. He went on to say that in the notice to attend hearing (exhibit D3) all the Respondent's rights were explained and the Respondent signed. In the hearing form (exhibit D4) it was indicated that the Respondent had no evidence to defend himself therefore he refused to sign the hearing form and the summary of his statements.

According to Mr. Qamara, the Respondent was given a right to appeal which was explained in the notice to attend hearing and in the additional document. That DW2 testified that the Respondent refused to sign the hearing form. Mr. Qamara fortified that the arbitrator was biased in holding that DW1 gave to the Respondent petty cash of TZS 40,000/= for the Mombasa journey, which the Respondent first declined to go which was one of the reasons for terminating the Respondent and that DW1 chaired the disciplinary hearing. He contested the arbitrator's holding stating that DW1 did not testify to have given the Respondent the TZS 40,000/= and that neither his name nor his signature appeared in the said voucher (exhibit D1). Mr. Qamara thus urged this Court to allow the application by quashing and setting aside the CMA award.

On his part, Mr. Maganga strongly opposed the application contending that the notice/letter that terminated the Respondent gave a different

reason of termination as opposed to what appears in the form. That the letter stated that the Respondent was terminated due to negligence at work but in the hearing form that offence was not part of the allegations against the Respondent. Therefore, the Applicant failed to support the allegations raised instead of supporting what was alleged in the termination letter (exhibit P5). Mr. Maganga maintained that the Applicant did not state on which day the Respondent committed the alleged offences and even the decision reached therefrom. That the Applicant failed to prove that the termination was fair and valid. He cited section 39 of the Employment and Labour Relations Act, No. 6 of 2004 stating that the employer is duty bound to prove reasons for termination and that the Applicant failed to do so, prompting the CMA to hold that the termination was unfair.

Mr. Maganga further fortified that the cited rule 12 of G.N 42 of 2007 is inapplicable because the Applicant failed to state how the said standards were breached by the Respondent, as he failed even to tender the employment contract. Further, that the Applicant failed to tender the investigation report, contending that the driver's letter does not amount to an investigation report. Mr. Maganga also stated that the Applicant failed to adhere to rule 13(1) of G.N 42 of 2007, stating that the Applicant did not conduct an investigation prior to conducting the disciplinary hearing. Mr. Maganga also amplified that no investigation was conducted among the six listed offences. He cited the case of **Tanzania International Container Terminal Service (TICTS) Vs. Fulgence Steven Kalikumtima and 7 Others**, Revision No. 471 of 2016. He therefore reiterated that the whole process of terminating the Respondent was illegal.

Further, Mr. Maganga maintained that the hearing was not conducted as the following were not shown in the minutes of hearing: quorum, name of the chairman and secretary, members of the disciplinary committee, complainant and Respondent, the representative of the employer, witnesses for both parties and questions and answers put forth by the parties. Further, that it is not shown as to what actions were taken after the Respondent allegedly refused to sign the hearing form. Also, the Respondent was not reminded of the right of appeal after the committee recommended termination. According to Mr. Maganga, the Applicant's claim that the voucher was not issued to the Respondent by DW1 is unsubstantiated since it is upon the Applicant to name the person who issued the voucher to the Respondent. He concluded that the Applicant failed to adhere to section 37(4) of Employment and Labour Relations Act No. 6 of 2004 and rule 12(4)(a) of G.N 42 of 2007.

Re-joining, Mr. Qamara maintained that one of the charges levelled against the Respondent was leaving the driver in Mombasa without information, and hearing was conducted on that charge both in the hearing Committee and the CMA. He therefore named this as negligence on the part of the Respondent. According to the evidence tendered, the Applicant was right to dismiss the Respondent since the offence was proved in the hearing committee. He maintained that the reason for termination was due to negligence as per the law. On the investigation, Mr. Qamara stated that the purpose of investigation is to ascertain whether there is need of disciplinary hearing and not to prove commission of the offence. According to Mr. Qamara, the Respondent did not disprove or comment on what was charged against him.

I have carefully gone through the CMA record, the affidavit for and against the application and the submissions by the Applicant's counsel and Respondent's personal representative. The issue arising from the affidavits and the submissions is whether the CMA decision was fair considering the evidence before it.

Having properly scrutinised the evidence, I do not agree with the contention that the CMA did not consider the testimonies of the parties and the exhibits tendered. The evidence of both parties was properly analysed and considered. I go along with the holding of the CMA that there is no evidence that the allegations were proved in both the disciplinary hearing and at the CMA. In the CMA, when cross examined, the Respondent denied to have signed exhibit D3, which is the notice to attend the hearing. It is also noted that the alleged offences were not proved since even the driver who claim to have been left in Mombasa was not called to testify. Therefore, the holding of the CMA that the offences against the Respondent were not proved was proper. The reason stated as the reason for his termination and what is contained in the termination letter do not tally. As rightly held by the CMA, the Respondent's termination was substantively unfair.

I now turn to the procedure on terminating the Respondent. In the termination letter it shows that the Respondent was terminated for being negligent at work. This is contrary to the charges levelled against him in the disciplinary hearing and at the CMA. This is procedurally an error. The Respondent was not afforded a right to respond to the charge of negligence. He was equally denied the right to be heard. I am fortified by the decision of this Court in ***World Vision Tanzania Vs. Charles***

Masunga Maziku, Lab. Div. KGM, Revision No. 7 of 2014, which emphasized that an employee cannot be charged with a different offence and be punished by another offence. That amounts to denial to the right to be heard.

On the complaint whether the Applicant conducted investigation as per rule 13(1) of G.N 42 of 2007, I agree with the Respondent's Personal Representative that such investigation was not done. The sole evidence relied by the Applicant to prove that the investigation was conducted is the letter written by a driver one Godwin Mbaga. That letter is not dated to prove the date on which the alleged offence occurred. It does not specify on the place the offence occurred. Further, such driver was not a witness in the Committee. Thus, such a letter cannot amount to an investigation report within the meaning of rule 13 of G.N No. 42 of 2007. Notably, the Applicant's evidence was uncertain as to whether the offence took place at Mombasa or Holili.

Further, the hearing notice form does not disclose the allegations the Respondent was charged with. The response of the Respondent to the allegations is left blank and there are no reasons for the same to be left blank. The Applicant contended that the Respondent did not deny the allegations, but it is shown at the hearing from item 12 that the accused denied all the charges against him but he had no proof. The Applicant stated that the Committee proposed that the Respondent be terminated but such recommendations do not feature in either the hearing form or in the analysis report.

Similarly, the claim that the Applicant complied with rule 12 of G.N No. 42 of 2007 is unsubstantiated. The alleged negligence on the part of the Respondent was not proved in both the Committee and the CMA. Even on the other six charges the Respondent was charged with, there was no proof that they existed, and no proof that the alleged offences co-occurred. Therefore, I agree with Mr. Maganga that rule 12(4) of the Rules was not complied with. I subscribe to the decision of the Court of Appeal in ***National Microfinance Bank Vs. Leila Mringo and 2 Others***, Civil Appeal No. 30 of 2018 (unreported), where it was held:

> *"The fact of the unreasonableness of termination cements the fact that the Respondents were unfairly terminated."*

For the above reasons, the termination of the Respondent's employment was both substantively and procedurally unfair as was held by the CMA. I find nothing to alter in the CMA award. I uphold it accordingly. Consequently, this application fails in its entirety. I make no order as to costs.

Order accordingly.

Y. B. Masara,
JUDGE.
23rd March, 2021.