**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN THE DISTRICT REGISTRY OF ARUSHA**

**AT ARUSHA**

**LABOUR REVISION NO. 10 OF 2020**

**(Originating from Dispute No. CMA/ARS/ARS/654/2018)**

**KENYA KAZI SECURITY COMPANY LIMITED.....APPLICANT**

**VERSUS**

**PAULO BURA MASSAY &**
**TITO BWIRE**
**JUMA GILOMA**
**NGARANGA MASHAURI.....RESPONDENTS**

## JUDGMENT

**19/04/2021 & 21/06/2021**

**GWAE, J**

This application is made under section 91 (1) (a), (2), (b) and (c), 94 (1) (b) (i)of the Employment and Labour Relations Act, No. 6 of 2004, Rules 24 (1), (2), (a), (b), (c), (d), (e) and (f), (3) (a), (b), (c) and (d) and 28 (1) (b), (c), (d) and (e) of the Labour Court Rules, GN. 106 of 2007. The applicant calls upon this court to revise and set aside the award of the Commission for Mediation and Arbitration at Arusha (herein the CMA) procured on the 10th January 2020 in favour of the respondents named above and not five respondents as wrongly indicated by the applicant in his application and to grant any other order this court may deem fit and just.

The applicant was an employer of the respondents. On the 19th October 2018, the applicant terminated the employment of the respondents on the reason of unlawful strike. The respondents filed a dispute at the Commission. The CMA's findings were that; the applicant had a fair reason to terminate the respondents as they did not follow proper procedures for lawful strike however the CMA observed that the applicant did not follow proper procedures in terminating the respondents as there was discrimination among the employees as those who pleaded for pardon were not terminated and those who were terminated for the reason that they did not plead for the pardon. The CMA thus ordered an award of twelve (12) months' salary compensation to each respondent.

Dissatisfied, the applicant then decided to file the present application. Grounds for revision averred to in the supporting affidavit are briefly as follows; that, the Hon. Arbitrator failed to evaluate the evidence properly and hence arrived at an award which is tainted with fundamental misdirection and non-direction in law and facts.

On the date fixed for hearing the applicant was represented by the learned counsel **Mr. Fidel Peter** while the respondents were represented by **Mr. Mengo Sichilongo** personal representative from TUICO.

Supporting his application Mr. Fidel briefly argued that, the CMA award was illegal on the reason that procedures were not followed as respondents were given an opportunity to seek for forgiveness but refused.

On his part, Mr. Mengo maintained that, the strike was lawful as the respondents were demanding for necessary working tools and that the strike was conducted not during the working hours. Furthermore, he submitted that the applicant was not justified to treat the employees who participated the striking differently, more so the applicant ought to have consulted the TUICO before taking any action against the respondents.

In his rejoinder, the applicant's counsel admitted that the applicant did not consult TUICO however he maintained that, the respondents were fairly terminated as they were given an opportunity for an apology just like their colleagues. About the respondent's claims on the working tools and poor working conditions Mr. Fidel submitted that the same were not proved at the CMA neither were they reported to the employer before striking.

After carefully going through the court records, both counsel submissions as well as relevant applicable laws I find the issues for determination are; **firstly,** whether respondents were terminated on fair reason, **secondly,** whether the termination of respondents was procedurally fair, **thirdly,** whether the CMA award is justifiable.

On the first issue as to whether the respondents were terminated on fair reasons. From the records in particular on the termination letters, it is revealed that, the respondents were glaringly terminated from unlawful striking, this is also supported by the evidence adduced before the CMA where both the applicant and respondents testified that the respondents were terminated for the reason of striking. That being the case, for it to be a fair reason the question that follows is whether the strike was a lawful one or not.

The law as per Rule 42 (1)-(16) of the G. N 42 of 2007 and section 80 (1) (a) – (e) of the Employment and Labour Relation Act Cap 366 R.E 2019 (Act) recognizes lawful strike and for the purposes of this judgment section (80) of the Act is reproduced herein under for easy of clarity;

> "80-(1) Subject to the provisions of this section, employees may engage in a lawful strike if-
>
> (a) the dispute is a dispute of interest;
>
> (b) the dispute has been referred in the prescribed form to the Commission for mediation;
>
> (c) the dispute remains unresolved at the end of period of provided under section 86(4) read with subsections (1) and (2) of section 87;
>
> (d) the strike is called by a trade union; a ballot has been conducted under the union's constitution and a majority of those who voted were in favour of the strike; and

(e) after the applicable period referred to in paragraph (c), they or their trade union have given forty-eight hours' notice to their employer of their intention to strike.

Looking at the above quoted statutory provisions, it follows therefore that, in order for a strike to be lawful the above requirements must be fulfilled or met before striking. Back to the matter at hand, it was the respondents who had a duty to establish that the strike was lawful and in compliance with the above provision of the law. Looking at the evidence before the CMA the respondents were claiming for working tools which were not provided to them by their employer and therefore, they informed their supervisor that on 13/09/2018 they would not enter into their night shift. However, there is no piece of evidence showing that the respondents adhered to the requirements of the above provision of the law particular referring the matter to the Commission for mediation, for this reason it is at this juncture that this court join hands with the findings of the CMA that the striking was unlawful and thus constituted a misconduct which justified termination of their employment.

On the second issue, whether the termination of the respondents was procedurally fair, the ELRA is also clear as to the procedures which the employer needs to follow when terminating his/her employees on reasons of strike out. These procedures are provided under Rule 14 (2), (3), (4), (5), (6), (7) & (8) of G.N 42 of 2007. According to this rule an employer who wants to terminate the

employment of an employee who participated in unlawful strike among others shall prior to the termination of the employee contact a trade union which in our case is TUICO to discuss the course of action it intends to adopt or take. From the records, plainly the applicant herein did not comply with this requirement and even the applicant's counsel Mr. Fidel in his rejoinder admitted on the failure of the applicant to consult a trade union before terminating the respondents.

The rules further provide that, in terminating the employees who evidently participated in the striking, an employer shall not discriminate striking employees by terminating some of them or after having terminated their employment, or re-instating some of them. This is what has happened in the case at hand, from the evidence of PW1, Elias Mgonja, the applicant's Human Resource Manager he stated that those who participated in the striking were 15 but not all of them were subsequently terminated as some of them requested for pardon from the applicant and their employment was not terminated. Among the striking employees who was not terminated on reason that he asked for forgiveness from the applicant is PW2, Paul Daudi who testified that after he was terminated by the disciplinary hearing he appealed and on appeal, he asked for forgiveness where he was forgiven and was told to continue working.

From the above circumstances, it is therefore apparent that the applicant's conduct of terminating the employees who did not ask for forgiveness and left

those who were pardoned is tantamount to discrimination as envisaged by rule 14 (7) of G.N 42 of 2007 was enacted in order prevent discrimination at the work place (See also provisions of section 7 of the Act). According to this rule if at all the applicant wanted to terminate the striking employees, he would have done so to all the participants and cannot justify the termination basing on the question of "who asked for forgiveness or pardon".

This court is nevertheless quite aware that the law allows fair difference in treatment of the striking employees only on grounds of participation in strike related misconduct, picket violence or malicious damage to property (see Rule 14 (8) of G.N 42 of 2007). Had the applicant used the above grounds to differentiate conducts of the striking employees in terminating their employment, termination would have been procedurally and fairly justified. To this end it is undisputed that the respondents were substantively fairly terminated but unfairly terminated on the ground of requisite procedures.

Having discussed as herein above, I am justified to unhesitatingly hold that, the termination was procedurally unfair, the last issue is therefore answered in affirmative. Consequently, the CMA award is hereby confirmed. The applicant is ordered to pay each respondent 12 months salaries compensation as the remedy for unfair termination as was rightly ordered. No order is made since ordinarily

costs are not awardable in labour disputes save where complaint is vexatiously and frivolously instituted.

it is so ordered.

**M. R. GWAE**
**JUDGE**
**21/06/2021**