IN THE HIGH COURT OF TANZANIA

AT BUKOBA

APPLICATION FOR LABOUR REVISION NO. 9 of 2020

ANDREW NATHANAEL PANGA..... APPLICANT

VERSUS

KAGERA SUGAR LIMITED .....RESPONDENT

(Application from Original Award in complaint No.CMA/BUK MSNY/02/2020/24/2020)

JUDGMENT

27 & 30 July, 2021

MGETTA, J:

Disheartened with the decision of the Commission for Mediation and Arbitration (herein to be referred to as CMA), in original awarded No. CMA/BUK MSNY/02/2020/24/2020, the applicant has preferred application for revision registered in this court as Labour revision No. 9 of 2020 praying for the following reliefs:

i. This honorable court be pleased to revise the award of the commission for the Mediation and Arbitration at Bukoba in a complaint with reference No. CMA/MSNY/02/2020/24/2020 dated 19th day of June, 2020 by Hon Kokusima, L. Arbitrator.

ii. Upon revising the CMA decision and orders thereof, this Hon. Court be pleased to issue on order setting aside and quashing the impugned arbitration award which has been made under an

error material to the merit at dispute hence occasioning injustice and order reinstatement of the applicant without loss of remuneration and other entitlements accrued.

iii. Any other relief this Honorable court deems fit to grant.

The application was supported by the affidavit sworn by Andrew Nathanael Panga, the applicant while the respondent's industrial Relations officer one Angetile Lusajo Mwalyaje opposed the application through counter Affidavit.

To appreciate the context in which this application for revision was brought, it is imperative to have a brief recapitulation on the background of the matter. The applicant employee was employed by the respondent employer on 20/12/2001 as a watchman (*Mlinzi)* and in sometimes later on 5/8/2003 he was shifted to the post of Pump House operator. According to the employer, the applicant was absenting himself from his work and therefore he was verbally warned. That on 6/4/2020 He repeated a misconduct of absenteeism for about 4 hours from his working place where he left his pumping machine under operation which the employer viewed as endangering safety of the factory. The employer

decided therefore to terminate the applicant's employment through a letter dated on 27/4/2020.Following to that termination, the employee's defense at the CMA was that he was absent due to sickness which he came to report later to the employer.

After the CMA had heard both parties and evaluated evidence it came to its conclusion that the employer had a valid reason to terminate the employee due to what it viewed to be misconduct of absenteeism which the employee had been warned previously and added that he was negligent to failure to report his illness when his situation was still better so that the employer could have replaced him with another employee to the sensitive post of pump operation as the entire factory depended on its services. With regard to procedure arrived at, the CMA found it to be unfair as the applicant was not given his charge and require him to answer and be informed when the committee will be conveyed so that he may appear and defend his charge as a fundamental right to be heard as required by the law. The CMA therefore ordered the employer to pay compensation of Tzs 4,216,351.72/=. The relief ordered did not bless the applicant hence current revision.

When the matter was called on for hearing, Advocate Projestus Mulokozi, who appeared for the applicant elaborated that the CMA erred in law for condemning the applicant to have not reported for his sickness which he suffered at his working place. He contended that it was an error because illness is subjective for the one who is sick to tolerate and continue working depending on the situation prevailing to his health. Mulokozi contends that the fact that the applicant was sick on 6/4/2020 was not disputed as the applicant gave a sick sheet which was admitted as exhibits "A1" which was issued by the respondent officer (DW2) and the applicant was therefore bedridden to the Hospital of the respondent. It was Mr. Mlokozi's argument that if the Applicant would have been treated to other different Hospital perhaps, he could be regarded as a liar. That the act of CMA regarding such illness as gross misconduct is an error subject to revision.

Mr. Mulokozi further submitted that passing through evidence of DW1, DW2 and DW3 that the time which they allege that the applicant absconded from his work is uncertain as DW2 testified that the applicant on 6/4/2020 entered at work at 12:00 am but he disappeared during unknown time.

He argued that under the ELRA (code of good practice GN.42/2007 an guideline for disciplinary, Incapacity and incompatibility that time of 3 hours from work due to illness do not form serious misconduct instead is listed as minor misconduct which warning may be given. According to Mr. Mulokozi, he is surprised, that after the CMA was convinced that the applicant was not even heard on his allegation but proceeded not to order re-instatement and ordered compensation while in the CMF1 form which the applicant pleaded He prayed for reinstatement. That the CMA was therefore supposed to stick on the applicant pleading after the CMA had agreed that he was not heard. To bolster his argument, he cited the case of **Barclays Bank (T) LTD vs Jacob Muro;** Civil Appeal No. 357 of 2019 (CAT) (Mbeya) (unreported) which held that parties are bound by their pleadings. That since the respondent failed to prove fair reason, the CMA was supposed to order reinstatement which was prayed for.

Mr. Mulokozi distinguished the cited case by CMA which did not order reinstatement that in those cases employees were professional but the case at hand the employee is unskilled and a laborer who could be reinstated at work and be assigned any work.

Mr. Mulokozi further contended that in Labour matters; the employee has the burden of proof of fairness reasons for termination under S. 39 of ELRA that in order to discharge that burden has to prove that there was a fair and valid reason for termination which was arrived at a fair procedure and that the word 'and' connects the fair reason and fair procedure go together and not in alternative. He was of the view that once the procedure following termination was held to be unfair hence then the reason could not be valid.

Mr. Mulokozi further submitted that there was motive and plans to terminate the applicant as they did not need him. That DW2 and DW3 testified that they obtained the information of applicant's absenteeism through phone from the person they did not disclose while they were away, they decided to go to the cite where applicant works with an independent witness a security guardian but all the two independent witnesses the guardian and the one who informed them through phone were not brought before the commission to testify as they would have cleared before the commission the biasness environment revealed by the said officers. That failure to call those two independent witnesses this court must draw adverse inference to their credibility and reliability on

their testimonies and hence a failure to prove a fair reason. To back up his stance, He referred this court to the case of **Aziza Abdalla v R** [1991] TLR 71.

To substantiate that the DW3 was bad blooded, Mr. Mulokozi contended that according to the record, on the DW3'S testimony, that when DW2 informed him on the applicant illness he answered that he doesn't care as he doesn't need him at his work that even when he was called in a meeting DW3 bothered not on the applicant illness.

Invited for the reply, Advocate Moses Kalua submitted that it is the respondent's stand that the reason for termination was fair as the misconduct was repeating. He cited provision **Section 37 (2) (a) (b) of ELRA Cap 366 (R. E 2019)** and **regulation 12(1) (2) (3) (4) of Code of good practice rules GN.42 of 2007**. That an exhibit S6 on the meeting that the applicant admitted that he was not at his work. Mr. Kalua, referred exhibits S7 that the applicant was previously warned and referred page 6 of the CMA award that the applicant repeated and was verbally warned by DW2.The respondent's counsel therefore concurred with the CMA ruling that the applicant was lying as he failed to report his illness in time while he was at work since morning and came to report

around 1.00 Pm to be taken to hospital while he was in bad situation and failed to report early when he was in good situation. The fact that DW2 and DW3 went at his work and did not find him while applicant knows the procedure in informing the employer while is sick was a misconduct.

Mr. Kaluwa added that at page 8 of the CMA ruling, DW3 told the CMA that the job of applicant was so essential which was not required even to go away for 4 minutes as he could have caused a loss of 4 billion Tshs.Mr. Kaluwa further concurred with the CMA finding that the applicant was supposed to report his absence as he had all devices of communication with him. It was Mr. Kaluwa's conviction that absenteeism from work without leave is misconduct as per rule 9 (2) GN 42/2007 and since the applicant admitted to be out of his work for about 3 hours, the CMA was right to have ruled that absenteeism was a valid reason for termination that DW2 and DW3 statements were not objected by the applicant. To support his argument, he referred to me in **Vedastus S. Ntulanyenka & 6 others V. Mohamed Trans LTD**, Revision No. 4/2014 (HC) (Shinyanga) (unreported) where Mipawa J, as he then was, ruled that;

"Wherever statement of fact made by a witness is not challenged in cross-examination, it has to be concluded that the fact in question is not disputed"

Mr. Kaluwa further responded on the issue of ordering compensation instead of reinstatement that CMA was right to order compensation and not reinstatement as the reason for termination was valid though the procedure was not. To back up his stance, he cited the case of **Commercial Security Service Ltd vs, Said Chingumba** LCCD 140 2015, **NMB vs. George Atavasius Makange** Rev,1 of 2013 pp 17 &18, **NMB vs. Victor Modest Banda**, Civil Appeal No. 29 of 2018 (CAT) (Tanga) (unreported) that the word under **section 40(1) of ELRA** must be used disjunctively and not conjunctively. The advocate was of the view that the CMA could not have ordered compensation as the same time reinstatement.

Mr. Kaluwa further argued that the employer cannot reinstate the employee who doesn't fit to the business environment. It was Mr. Kaluwa's further argument that the CMA rightly found that the default was on procedure and not substantive and it did not order reinstatement.

That Similarly in the case of **Azizi Ally Aidha Adam vs Chai Bura Ltd** LCCD 2011-2012 page 192 did not order reinstatement.

Submitting in rejoinder, Advocate Mulokozi submitted that it is not true that the applicant admitted absenteeism as a misconduct as DW3 said on page 7 that the applicant was seen to be 4km away from working place of the applicant while on page 10 of the award the applicant admitted to be away from the building laying on the ground to access a hot air. Responding on the issue that the applicant was not lying for his sickness, Advocate Mulokozi respondent that the exhibit A1 & A2 were tendered without objection. That exhibits A2 is the discharge form issued by the doctor from the respondent's hospital that if he was telling lies the doctors for the respondent's Hospital would have said. That on page 8 and 9 of the proceedings DW2 admitted that the applicant after being discharged he failed to continue with the meting due to illness.

Responding that the applicant was never warned, Mr. Mulokozi stated that exhibit S6 is not a warning letter but a hearing form that it has no applicant's signature hence the advocate contends that there is no evidence for warning. That it is not right to use exhibit S7, a suspension letter to justify previous misconduct as it was also faulted by the CMA on

its procedure. That according to **GN 42 of 2007 rules** on Misconduct, Incapacity and Incompatibility policy absence which amount to gross misconduct is the one of more than 5 working days but the applicant was absent for 3 hours due to illness at the waking premises.

Mr. Mulokozi further submits that reinstatement is a discretion of the CMA to order but desecration must be exercised judiciously. It can be refused where it is impracticable due to serious misconduct of the applicant but in the case at hand the applicant had no grave Misconduct as he was out of his office for 3 hours but in the working premises for valid reason of illness. The applicants advocate further prays the applicant to be reinstated at his work without loss of remuneration and other entitlements.

Having carefully considered the parties' affidavit, record and oral submissions I should be in a position to confront the arguments as presented by parties' counsels.

To be in position to answer whether this revision is meritorious it is imperative to ascertain the nagging issues which is confronting both parties. From parties' arguments, I believe I have to determine whether

there was fair and valid reason for terminating employment of the applicant and the last issue touches on the rights of parties.

The CMA ultimately found that there was fair reason for termination but there was no fair procedure arrived at and therefore exercised its discretion to order compensation instead of reinstating the applicant. With regard to the procedure arrived at parties are at one that the procedure was unfair thus they both shake hands with the trial CMA. It is not in dispute that on 6/4/2020 the applicant felt sick (exhibit A1). That he was hospitalized at the respondent's hospital on 6/4/2020 and was later on discharged on 8/4/2020(exhibit A2). This undisputed fact is confirmed by exhibits A1 and A2 tendered by applicant and admitted before the trial CMA but were also in domain of the respondent as they were issued by respondent's officers. It is also not in dispute that about three hours the respondent was not in the operating machine/pump room as the applicant admitted to have been away nearby laying down for access of hot air after he felt unhealthy and bad condition when he was in operating machine/pump and DW2 and DW3 evidence was of the fact that they did not find him.

The question now to be answered by this court, is absenteeism of three hours from the operating building which occurred due to unreported sickness amount to misconduct which the employer should out rightly terminate the employee?

Accordingly, to **section 37 (2) of ELRA No. 6 of 2004** as referred by the respondent's counsel provides that employees conduct, capacity or compatibility if proved by the employer will amount to fair reason to terminated the employee.

The conduct of the employee relates to his or her behaviors. In case of termination on this ground, the employer may argue or reason that the employee be terminated because of some form of misconduct or mis behavior for example, insubordination towards superiors, assault, theft of accompany property and like. See **Sandvik Mining Construction Tanzania Ltd vs. Joseph Mlaponi** Revision No. 27 of 2012 (HCT) (Shinyanga) (unreported).

The Employment and Labor relations Act does not specifically stipulate what acts amount to misconduct. **Rule 12 (3)** of the code of good practice **Rules, GN No. 42 of 2007** as rightly referred by Mr.

Kaluwa, provides for the acts of misconduct which may justify termination.

12 (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 family, of any person associated with, the employee and*
f. *Gross insubordination*

From the above provision, absenteeism was not categorized as one ground to justify termination. Though under common law which is an important source of rules regulating conduct of employees at work place. The employee must act in good faith towards employer. If an employee is guilty of misconduct breaches the common law duty to act in good faith towards employer. Therefore, absence without leave and repeated absenteeism are misconduct but not a serious misconduct to warrant termination for first occurrence. In our jurisdiction, I wish to drive much help from the provisions of the **Employment and Labour Relations**

(Code of Good Practice) Rules, 2007 on the Schedule titled Guidelines for Disciplinary, Incapacity and Incompatibility policy and Procedures, (as also referred by Mr.Mulokozi) with the section titled **Offences for which warnings may be given** concerning absence, rule 1 provides *"Late for work, leaving work place without permission or general time keeping offences"* Rule 2.*"Absence from work without permission or without acceptable reason for up to five working days".* Moreover, under the other heading which provides **offences which constitute serious misconduct and leading to terminate of an employee due to absence** rule 1." *Absence from work without permission or without acceptable reason more than five working days"*

The same schedule of **GN No.42/2007** on **the guidelines for disciplinary, Incapacity and Incompatibility Policy and Procedures** guides on rule 2 and 3 the procedure for verbal and written warnings that verbal warning can be given by the supervisor or manager of the employee for the purpose of correcting his behaviors or counseling for minor misconduct and if the employee does not improve among other steps the written warning could be given which in a written warning

issued in prescribed form to an employee personally, which warns him that a future misconduct may result in termination.

Rule 12(1)(a) of Employment and Labour Relations (Code of Good Practice) Rules, GN.No.42 of 2007 as referred by Mr. Kaluwa, reads on fairness of the reason that:

"12(1) Any employer, Arbitrator or judge who is required to decide as to 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).....

(iii).....

(iv).....

(v)Termination is an appropriate sanction for contravening it.

From the above discussed provisions at lengthy, I paused to ask, Given the fact that the sickness of the applicant was not disputed on the particular date of the alleged misconduct of 3hrs absenteeism, and well known to the employer; was it reasonable to hold a non- reporting of

sickness by the employee who was sick, that he did not report through communication devices he had, as a misconduct warranting termination of applicant's employment. The answer is in negative. In my view, absenteeism of such a circumstance which the employee had offered a reasonable explanation cannot amount to misconduct. The trial arbitrator attempted to rely on the act of the applicant as gross negligent of not reporting his absence from his work so that the employer replaces another employee. It is my respective view that ever since the respondent has not disputed applicant's sickness on the particular day and there was no evidence that the employee was away 4km from the employer's compound/premises holding him for gross negligent will amount doing injustice to him. I am thus inclined to agree with Mr. Mulokozi that illness is subjective to the person who is sick as it is not known the situation the applicant had at that particular moment he was sick taking into account that exhibit A1 and A2 issued by the respondent to the applicant evidencing sickness this court has not been able to know what actually and scientifically, the disease the applicant was suffering from and if at all with that disease was able to act anyhow in reporting.

The respondent terminated the applicant also basing on the previous records that through DW2 the applicant was verbally warned twice by DW2, his supervisor on ground of absence. This court faults this proposition as there was no any further written warning to the applicant after verbal warning ever tendered at the CMA in its entire proceedings. It is apparent that exhibit S7 is not a warning letter as rightly argued by the applicant's counsel. I had time to peruse the said exhibit I am convinced that it is not a warning letter neither in its content nor in its form. I am therefore respectively constrained to hold that since the applicant was never warned with the written warning even if it is assumed the non-reporting of his absenteeism of 3hrs time to be misconduct, it was supposed to be a misconducted which amounted to warning and not termination as absenteeism of 4 days and below requires warning as per the already referred GN.No.42/2007 and under the same law as seen already termination without warning on absence ground is being absent at work without leave for more than five days. Hence termination was not appropriate sanction in this matter.

In the circumstances of this case, I respectfully and entirely agree that there was no substantive fairness leading to termination of the

Applicant. Once I have found that there was no valid and fair reason following termination of the applicant other arguments and cited authorities are rendered obsolete.

I now move to determine the last remaining issue on the rights of parties concerning the discretion of the Arbitration to order compensation instead of reinstatement. This issue should not detain me as it has also been overtaken by the event as I have held already that there was no fair and valid reason for termination and parties agree with the trial CMA that the procedure following termination was also unfair. I will therefore be legally compelled to order reinstatement of the employee as per **section 40(1)(a) of ELRA Cap 366 (R.E 2019)** to be reinstated at his work without loss of remunerations and other entitlements save for repatriation costs which the CMA had rightly found that the applicant was employed from a place of employment.

In the event, this appeal is allowed. I quash and set aside the decision of the CMA to the impugned extent and order the respondent employer to reinstate the applicant employee without loss of remuneration and other legal entitlement during the whole period he was absent from work due to unfair termination.

Order accordingly

J. S. MGETTA
JUDGE
30/7/2021

COURT: This judgment is delivered today this 30th day of July, 2021, in the presence of Mr. Peter Matete, the learned advocate for the applicant and Mr. Richard Mzule, the learned advocate for the respondent.

J. S. MGETTA
JUDGE
30/7/2021

COURT: Right of appeal to the Court of Appeal is fully explained.

J. S. MGETTA
JUDGE
30/7/2021