IN THE HIGH COURT OF TANZANIA
LABOUR DIVISION

AT MWANZA

LABOUR REVISION No. 15 OF 2020

(Originating from Labour Dispute No. CMA/MUS/ 180/ 2017 dated on 22/01/2020)

BETWEEN

THE TRUSTEE OF TANZANIA NATIONAL PARKS..... APPLICANT

VERSUS

MAJUTO O. CHIKAWE AND GEORGE S. SAINA..... RESPONDENT

JUDGMENT

30th July & 24th August, 2021

TIGANGA, J

This judgment is in respect of an application for revision namely Labour Revision No.15 of 2020 filed by a notice of application, and chamber summons and an affidavit of **Richard Patrick Kafwita**, who introduced himself as the Principal Human Resource Officer of the applicant, who is conversant with the facts of the case.

The application was preferred under section 91(1)(a)(b)(c), (2)(a)(b)(c) and 94(1)(b)(i), (d)(i) of the Employment and Labour Relations Act No. 6 of 2004, as Amended, section 51 of the Labour Institutions Act,

also as amended and under section 14(a)(b)(c) of the Written Laws, Miscellaneous Amendment Act No. 03 of 2010 and Rule 24(1), (2),(a)(b)(c)(d)(e)(f) & (3)(a)(b)(c)(d) and 11(a)(b) and Rule 28 (1)(a)(c)(d) & (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;

1. To call for and examine the records of the proceedings of the CMA of Mwanza **CMA/MUS/ 180/2017** dated 22/01/2020 between the parties and revise and set aside the arbitrators award dated 22nd January, 2020 for the following order;
    (a) That there has been an error material to the merits of the subject matter before the CMA of Mwanza involving injustice,
    (b) That the learned Arbitrator acted with material irregularities in assessing the plausibility of the evidence presented before him, he ended to an erroneous findings and adverse inference that led to miscarriage of justice on the side of the applicant, and
    (c) The award was improperly procured, and

2. That the Hon. Court may revise the proceedings and make such order as it deems fit and just.

The brief background of this dispute deciphered from the affidavit and the record is that the respondents were employed by the applicants as Park rangers before their employments were terminated by the applicant for allegedly committing the misconduct which was termed to be theft and receiving Tshs. 7,600,000/=from the villager of Arash village who were illegally grazing cattle inside the Serengeti National Park.

Following that accusation the respondents were charged in the Disciplinary Committee where they were found guilty of the charges and consequently terminated from the employment. Following that termination the respondents referred the matter to the CMA where upon full hearing the CMA held that there was no valid reasons for termination and therefore the applicant was ordered to pay to the respondents compensation as provided under section 40(1)(c) of the Employment and Labour Relations Act, (supra). The affidavit filled in support of the application raises the complaint that the CMA delivered the award beyond the prescribed time it was supposed to deliver it. It also raised the complaint against the arbitrator's findings that the termination of the respondents was

substantively unfair as it was first reported to the police and an identification parade was conducted by the police themselves and that the procedure was tainted with illegality because the police was not supposed to terminate their investigation on request by the applicant herein in order to deal firstly if any with the dispute administratively dispensing with some criminal process. He complained that the finding by the Arbitrator was irregular both substantive and procedural and that lead to the termination of the respondent. That the arbitrator failed to analyse the evidence and appreciate that at any point in time, the respondents have never been charged before any court of law therefore there was no any miscarriage of justice when they dealt with the matter administratively.

In paragraph 9 of the affidavit sworn and filed in support of the application the applicant proposes three legal issues for determination that is;

a. Whether it was sound at Labour Law practice for an Arbitrator to hold that the employer was not supposed to conduct disciplinary hearing on matters reported only to police for investigation, before reaching a court of law, given the special circumstances of the case before him.

b. Whether it was Valid to ignore analyzing abundance of evidence presented before CMA at the expense of assumption that because the criminal investigation process had started but halted, then the whole disciplinary process which followed was obsessed with procedural irregularity

c. Whether a matter reported to Police and halted efore reaching a court of law constitutes an offence founded at Labour Law for furtherance of the disciplinary action, if any in conformity with the spirit of justice.

The application was opposed by the respondents by filing the notice of opposition and notice of representation as well as the counter affidavit sworn by Felix James, Advocate, who said to have been instructed by the respondents to take the conduct of the matter.

In the counter affidavit, he said that the deponent in the affidavit filed in support of the application did not show that the late delivery of the award prejudiced the applicant. He stated further that the allegations of corruption were dropped on the ground that there was no evidence to prove the charge, therefore there was no evidence to prove the disciplinary action against them.

The respondents vehemently disputed the contents of paragraphs 9(a), (b) and (c) of the affidavit which contains the legal issues to be addressed by the court, and said that there is no legal justification or reasons to make this honourable court depart from the CMA award regarding the disputes No. CMA/MUS/180/2017.

In the reply he deposed that the identification parade was not the only evidence, there was also evidence of other four witnesses who were called from the nearby village and testified both at the hearing and the CMA. Also that the respondent were not criminally charged before the disciplinary hearing which led to the termination of the respondent's employment and they were terminated basing on the grounds none other than the aspect relating to labour matters.

With leave of the court the application was argued by way of written submissions. In the submission in chief, the counsel for the applicant adopted the affidavit filed in support of the application, and reminded the court of the three legal issues framed in paragraph 9 of the affidavit. He submitted that the respondents were charged for offending the provision of Rule 12(3)(a)(d) of the Employment and Labour Relations Act, (the Code of Good Practice) GN.No. 42 of 2007 relating to dishonesty and negligence,

read together with Regulations 89(7) of the Tanzania National Park Regulations GN. No 337 of 2011, that failure to observe the conditions prescribed thereto amounts to a gross misconduct. He submitted that the charges related to the offence committed by the respondent together with their fellow on the patrol dates from 26-29/05/2017.

Submitting on the findings of the CMA, he submitted that the arbitrator applied the law out of context as he believed that a mere reporting the matter to police meant that parties had already charged before the court therefore could not be dealt with administratively, he submitted that the position by the CMA led to injustice to the applicant for two reasons, firstly, that the CMA had not considered the evidence of the applicant's witnesses on assumption that the matter had already been decided by the court, and secondly, that on such a wrong assumption he awarded the case in favour of the respondent employees without considering the weight of the evidence submitted to the CMA by the applicant. His arguments based on the fact that there was a serious irregularity in assessing plausibility of the evidence for instance of DW1, DW2, DW3 and DW4 as well as exhibit D4. These witnesses said they were fined and paid a total of Tshs. 7,600,000/= to the respondent employees

but were not given receipts by the respondent who fined them. That according to him proved the dishonesty, this evidence was not considered simply because the Hon. Arbitrator thought reporting the matter to police halted the employer to handle the matter under the disciplinary wing, regardless the evidence of DW7 a detective police officer who said they did not take the case to court because the respondents requested the case to stop. He insisted that reporting the matter to police does not mean that the person has been charged before the court of law. He submitted that the evidence of DW6 on identification parade was not the only evidence; there was other evidence of other witnesses. He submitted that looking at page 4 of the award the whole award was based on that misconception.

He further submitted that the case of **Stella Manyahi and Another vs Shirika la Posta, Lab. Div, Dsm, and reference case No. 02 of 2010**, reported in 2013 LCCD 155 and section 37(5) of ELRA were misconstrued and misapplied, as they meant and prohibited the matter to proceed where the case has already been filed in court as the criminal case thereby arraigning the suspect. But in this case the Disciplinary Committee sat on 15/08/2017 and 16/08/2017 after the investigation of the case reported to police had stopped. He cited the case of **The DPP vs Ally Nur**

Dirie and Another [1988] T.L.R 252 CAT, in which the concept of at what time the case is taken to have been filed in court, and a trial commences after the person has been arraigned in court or tribunal of competent jurisdiction to try him, and where he is informed of the charge and required to plead.

The counsel submitted that it was not sound in labour law practice for arbitrator to hold that reporting the matter to police, before the matter was taken to court, stopped the disciplinary proceedings. He also submitted that it was not valid to ignore the abundant evidence presented before the CMA basing on the assumption that the reporting of the matter to police meant charging the employee to court, and that whatever followed thereafter was irregular which vitiated the disciplinary hearing. He referred this court to section 99(3) of the ELRA which requires the court or CMA to take into account any code of good practice established. And also rule 25(1) of the Labour Institutions (Mediation and Arbitration Guideline) GN.No. 67 of 2007.

He submitted that the applicant had enough evidence ranging from that of the normal villagers who were purportedly fined by the respondents, members of the park management who were supervisors to

the respondents, police officers who investigated the complaint and that all these evidence proved that there were reasons for termination and the procedures were followed. He relied on the provision of section 111, 112 and 123 of the Evidence Act [Cap 6 RE 2019], the burden of proof and estoppel. He in the end asked the court to base on section 91(2) of the ELRA [Cap 366 R.E 2019] to allow that application and set aside the award by the Arbitrator for having been based on wrong assumption.

In reply submission the respondent responded on all grounds as listed one after the other, they submitted that basing on section 37(5) of the ELRA that the disciplinary Committee was not supposed to conduct the hearing after the matter had been reported to the police for investigation. They also relied on the case of **Stella Manyahi and Another vs Shirika la Posta, Lab. Div, Dsm, and reference case No. 02 of 2010**

They submitted that the evidence of DW5, DW6 and DW7 have clearly proved that police investigation had already been conducted in the matter and therefore the disciplinary committee was supposed not to be conducted as the offence of theft could not have been proved by the disciplinary committee, but before the court of law be the evidence beyond

reasonable cause. They prayed that the first ground lacks merits and therefore it be dismissed.

Regarding the second and third grounds, he combined and argued them together after realizing that they were similar. He submitted that, whether there was a right to terminate the employee or not, it is immaterial after the matter had been reported to the police for investigation, and the investigation had already been commenced, they recited the case of **Stella Manyahi and Another vs Shirika la Posta,** (supra) as well as section 37(5) of the ELRA.

Distinguishing the case of **The DPP vs Ally Nur Dirie and Another** [1988] TLR 252 CAT, he submitted that, it discussed the issue of pending trial which means it was dealing with the case which was already in court unlike this one which was under investigation. He submitted that, as the issue at hand deals with the commencement of Criminal investigation it is regulated by section 10(1) of the Criminal Procedure Act, Cap. 20 R.E 2019. He submitted that in this case the evidence of PW5 and DW6 proved that the police had already commenced investigation.

He submitted that the main issue which triggered the arrest of the respondent was the allegation of theft, not the disciplinary hearing, now

having proceeded in total disregard of the provision of section 37(5) of the ELRA and the authority in the case of **Stella Manyahi and Another vs Shirika la Posta,** (supra), to convene the disciplinary Committee and conduct the disciplinary hearing, the employer cannot escape the blame that he had no valid reasons to terminate the respondent and did not follow procedure to do so. He asked the application to be dismissed for want of merits.

In rejoinder submission the counsel for the applicant submitted that, section 37(5) and the authority in **Stella Manyahi and Another vs Shirika la Posta,** are relevant only where the employee has already been accused of a criminal offence. He also submitted that the decision of **The DPP vs Ally Nur Dirie and Another (supra)** is relevant in pointing out that police station is not a court and that people are not charged before police station, but the case is reported there for investigation. He insisted that reporting the matter to the police did not in effect halt administrative procedures of commencing and conducting the disciplinary hearing.

Now having summarized at length the contents of the documents filed in support and opposition of this application, it is instructive to find that, the award made in respect of the labour dispute subject of this

revision was based on the fact that it was not proper for the applicant to mount the disciplinary hearing process after the matter has been reported to police and the investigation of the same has been commenced. The findings was based on the provision of section 37(5) of the ELRA (supra), as interpreted by the High Court Labour Division in the case of **Stella Manyahi and Another vs Shirika la Posta,** (supra).

To appreciate the merit or demerit of the findings, I find it pertinent to reproduce the said subsection and what it provides.

> *"(5) No disciplinary action in form of penalty, termination or dismissal shall lie upon an employee who has been charged with a criminal offence which is substantially the same until* ***final determination by the Court and any appeal thereto.***" [Emphasis Added]

In essence the provision gives the following conditions, where an employee commits or is accused to have committed the act which is both the disciplinary offence and a criminal offence, the employer shall not be allowed to take any action in form of penalty, termination or dismissal against such employee where the complaint has been made to the police and I would add that, any other investigative authority and following that report the said employee has been charged with Criminal offence which is

substantially the same until final determination by the Court and any appeal thereto.

This means that, the employer is prevented only by the case pending before the court not the report made to the police or impending investigation.

The Arbitrator also relied on the authority in the case of **Stella Manyahi & Another vs. Shirika la Posta**, (supra), reading between line the finding of the court which for easy reference I hereby quote, it was thus held:

> *"When an employee is accused of criminal offence which is also a breach of disciplinary code and the employer has taken the bold step of reporting the incident to the police and the police investigation is commenced, other disciplinary proceedings should not be mounted ....* ***No proceedings for imposition of a disciplinary penalty should be instituted pending the conclusion of the criminal proceedings and of any appeal therefrom."*** [Emphasis added]

Just like in the provision of section 37(5) of the ELRA the catch phrase is the pending criminal proceedings or an appeal therefrom. The term Criminal Proceedings being the catch phrase, is defined to mean;

> *"Criminal proceedings is a proceedings in courtin the prosecution of a person charged with the commission of the*

Crime, contemplating the conviction and punishment of the person charged" See ***State Ex rel. Sweet vs Green*** *360 Mo.1249*

In this case there was no evidence that there was any criminal proceedings before any court at the time when the disciplinary proceedings was commenced, what was said is that the matter had been reported to police and there was pending investigation going on.

Criminal investigation does not amount to criminal proceeding in the sense that, while the investigation is conducted by the investigative machinery which includes the police and is prompted by the complaint, with its main objective being to establish if there is enough evidence to charge a person in court to face criminal case, criminal proceedings are commenced by a charge sheet or indictment filed in court to commence a criminal case against an accused who is accused to have committed the offence.

In this case as earlier on pointed out the Arbitrator refrained from deciding the matter basing on the evidence, he only based his decision on the unfounded belief that section 37(5) of the ELRA prevented the employer to commence the disciplinary proceedings and to take any action

in the form of penalty, termination or dismissal against the employee where there is pending criminal investigation in place, now that it has been found by this court that the employer is restricted only where there is pending criminal proceedings before the court or an appeal therefrom, I thus order that the decision was made on a wrong assumption, and since the matter was not decided based on the entire evidence, I thus find the application to have merits, and allow it, consequently only the award passed is quashed and set aside but the proceedings remain intact. The matter it thus returned to the CMA for the Hon. Arbitrator to compose the award over the dispute basing on the entire evidence, after considering the law applicable.

It is accordingly ordered.

DATED at **MWANZA** this 24th day of August, 2021

J. C. Tiganga

Judge

24/08/2021

Judgment delivered in open chambers in the presence of the parties through on line audio tele-conference. Right of Appeal explained.

J. C. TIGANGA

JUDGE

24/08/2021