

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LABOUR DIVISION)
AT ARUSHA
REVISION APPLICATION NO. 97 OF 2020**

(Originating from CMA/ARS/ARB/582/2020)

ROBERT MARTIN..... APPLICANT

Versus

AND BEYOND TRAVEL LTD.....RESPONDENT

JUDGMENT

16/08/2020 & 18/10/2021

GWAE, J

The applicant, **Robert Martin** has brought this application for revision under the provisions of the Labour and Employment Relations Act No. 6 of 2004 ("Act") and the Labour Court Rules, 2007 (Rules) alleging that the award of the Commission for Mediation and Arbitration of Arusha at Arusha (Commission) has material error to the merit of the case amounting to injustice since he was unfairly terminated by the respondent, **And Beyond Travel Ltd.**

The applicant was employed by the respondent since 1990 however on the 11th September 2019 he was terminated from his work by his employer on the ground of abscondment from work for more than five days. In the CMA the

applicant prayed for 24 months' compensation for unfair termination, annual leave, one month's salary in lieu of the requisite notice, worked days and severance pay. In its conclusion, the Commission was of the view that the applicant's termination of employment was warranted by a valid reason and went further holding that the application of procedures should not be formalistic and that procedures ought to be adhered if there is any contractual relationship between the parties. The learned arbitrator consequently dismissed the dispute.

Aggrieved by the arbitral award on the grounds that; the Commission failed to consider the evidence before especially the contention that, his absence for six weeks pertained with good reason that he was sick and hospitalized at Selian Hospital at Arusha and that he was denied the right of being heard before the Disciplinary Hearing Committee.

During hearing of this application, the applicant and respondent were represented by Mr. John, the applicant's personal representative and Mr. Erick Kimaro, the learned advocate respectively.

Supporting the application, the applicant's representative adopted the affidavit and added that the applicant would be paid 12 months' compensation for unfair termination.

Seeking an order dismissing this application, Mr. Kimaro argued that, the applicant was fairly terminated as there was valid reason for the same. Admittedly, the learned counsel for the respondent argued that there was no proof of service of notice for the Disciplinary hearing against the applicant as the same was through mobile phone communication. Alternatively, Mr. Kimaro argued that in case this court finds that, there was violation of procedural law on the part of the respondent, the applicant be entitled to compensation less than 12 months' salary compensation. He supported his argument by citing a decision of this court (**Mwipopo, J**) in the case of **Bartholomeo A. Gunza vs. Da Ceramica Centre (2001) Ltd**, Revision No. 742 of 2019 (unreported) where compensation awarded in favour of the applicant was less than 12 months' compensation than ordinarily ordered by the court pursuant to section 40 (1) (c) of the Act.

In his rejoinder, the applicant's representative stated that since the applicant was unfairly terminated in terms of procedural aspect, the respondent should therefore be ordered to pay compensation in accordance with the law, severance pay and certificate of service.

Now, to the determination of this application for revision, I am outright of the view as correctly admitted by the respondent's learned counsel that, there was no tangible evidence as to the proof of service of notice of disciplinary hearing as depicted in the disciplinary hearing form which does not even indicate that the

applicant was served but opted not to appear for reasons best known by himself. More so, the purported notice to appear dated 19th August 2019 (RE2) was not signed by the applicant to substantiate that he was duly served.

I have further looked at the letters written by Selian Hospital and addressed to any person concern (AE2-dated 12th August 2019 and other dated 5th September 2019-AE3). In this situation, the respondent was therefore supposed to be patient and diligent in making investigation in order to ascertain if the applicant was truly sick and admitted in the said hospital or it was false report or forged letters before termination. In this particular case, investigation report was necessary as was rightly emphasized in **Tanzania International Terminal Services (TICTS) v. Fulgence Steven Kalikumtima and others**, Labour Revision No. 471 of 21) (unreported) where Nyerere, J stated among other things that;

"However, there is no scintilla of evidence to substantiate that applicant conducted actual investigation, therefore indicates that the applicant charged the respondents and finally terminated their employment before conducting investigation as required in law. Thus, I am of the considered view that the arbitrator did consider that there was no investigation which was conducted, this is in the absence of such proof, investigation report, which rendered the whole process illegal".

As it is evident from the record that, there is no clear evidence with effect that, the applicant was served with notice of disciplinary hearing but he ruined it and considering the fact that right to be heard is fundamental which ought not to be unreasonably violated as was rightly emphasized by the Court of Appeal of Tanzania in the case of **Elia Kasalile and 20 others v, Institute of Social Work**, Civil Appeal No. 145 of 2016 (unreported) where it was held that, the termination of the employees was of no effect following failure by the employer to charge and accord the employee the right of being heard. Fair play or hearing in any proceeding is vitally important and failure of which renders any proceeding and a decision or order thereto a nullity (**Donai Kilala vs. Mtwara District Council** (1973) LRT 19).

Similarly, the investigation as required under Rule 13 (1) of the Employment and Labour Relations (Code of Good Practice) in this particular dispute was necessary. I say so for reason that there ought to be a proof if the applicant was really sick, admitted and Hospitalized at Selian Hospital instead of rushing to termination.

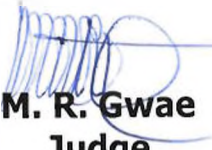
Basing on the foregoing, the finding by the learned arbitrator that, the procedural law was fundamentally followed is quashed and set aside and find that the termination of the applicant's employment was unproceduralfair.

As to the terminal benefits or reliefs available in favour of the applicant. Having considered that the applicant worked with the respondent for more than 20 years (1990-2019) and the fact that there is no evidence contrary to the applicant's contentions that, he was sick and admitted at Selian Hospital. Hence, this dispute and the former in the case of **Bartholomeo A. Gunza vs. Da Ceramica Centre (2001) Ltd** are different in terms of services and strength of evidence adduced by the applicant as far as his sickness is concern. More so, it must be known that award of less than 12 months' salary compensation must pertain with special reason as compensation of 12 months' salary in terms of section 40 (1) (c) of the Act is minimum.

On the other hand, considering the outbreak of the Pandemic disease (Corona-19) followed by economic crisis worldwide, the applicant is entitled to 12 months' salary compensation, one-month salary in lieu of notice, severance pay as per law and issuance of certificate of service


Consequently, this application is granted, the respondent is ordered to pay the applicant twelve (12) months' salary compensation which is equal to Tshs. **1,221,132/= x12=14, 653,584/=** severance pay, one-month salary and certificate of service. No order as to costs of this application is made due to the obvious reason that the matter is a labour dispute where costs are awardable in exceptional circumstances.

It is so ordered.



M. R. Gwae
Judge
18/10/2021

Court: Right of appeal to the Court of Appeal of Tanzania is open and fully explained for any aggrieved party.



M. R. Gwae
Judge
18/10/2021

