IN THE HIGH COUR OF THE UNITED REPUBLIC O vuiF TANZANIA

(LABOUR DIVISION)

AT ARUSHA

LABOUR REVISION NO. 44 OF 2020

(Arising from Labour Dispute No. CMA/ARS/ARS/268/2018/79/2020)

FIBRE BOARD (2000) LTD ..... APPLICANT

VERSUS

OTIENO KAMBRUSI .....RESPONDENT

JUDGMENT

8/9/2021 & 20/10/2021

ROBERT, J

The Applicant, **Fibre Board (2000) Ltd,** filed the present application seeking revision of the decision of the Commission for Mediation and Arbitration (CMA) in Labour Dispute No. CMA/ARS/ARS/268/2018/79/2000. The applicant is praying for the following orders: -

1. *That, this Honourable court be pleased to call for and examine the records of CMA Award made on the 17th day of July, 2020, in labour dispute No. CMA/ARS/ARS/268/2018/79/2020, by Honourable Arbitrator, Stanslaus H. for the purpose of satisfying itself as to the correctness, legality or propriety of the proceedings and orders made therein and revise and set aside the same.*

2. *That, this Honourable Court be pleased to quash the decision of the commission for mediation and arbitration.*
3. *Any other relief (s) this Honourable court may deem fit and just to grant.*

The application is supported by a sworn affidavit of **Mr. Spous John Mushi**, General Manager of the applicant and resisted by a counter affidavit of the respondent herein.

Briefly stated, facts giving rise to this application reveals that, the Respondent was employed by the applicant on 1st June, 2016 as a Tractor and Bell Operator on a contract of one year renewable and terminated on 24th April, 2018 for gross negligence. The applicant alleged that the Respondent recklessly drove the bell through the power cables with high power voltage which supplies power to the industry. Prior to his termination, the Respondent was immediately suspended. He was later called to attend the disciplinary hearing on 16th April but he failed to enter appearance.

Thereafter, both the applicant and respondent agreed to end the contract peacefully by signing an agreement through which the applicant agreed to pay the Respondent as a way of ending their relationship. However, the respondent referred the matter at the CMA claiming TZS 50

million. The CMA heard the matter and delivered its award in favour of the respondent.

Aggrieved, the applicant registered the present application inviting the court to consider the following legal issues: One, whether the arbitrator failed to consider the evidence adduced by the applicant at the CMA; two, whether the arbitrator considered the evidence adduced by the respondent at the CMA without any material evidential proof; three, whether the arbitrator's decision was based on his preconceived opinion without considering the evidence by the parties during the proceedings; and four, whether damages awarded were proper and proved as required by the law.

The application was resisted by the respondent who filed his counter-affidavit to that effect on 18 Sep, 2020.

When this matter came up for hearing, the applicant was represented by Mr. Elcana Mollel, learned counsel while the respondent appeared in person without representation. At the request of parties, the court ordered parties to argue the application by filing written submissions.

Supporting the application, Mr. Mollel argued that, the respondent was awarded Tshs. 2,040,000/= being the 12 months compensation for

unfair termination while there was a fixed term contract between the applicant and the respondent, therefore, the proper cause of action ought to be breach of contract. However, the CMA treated it as unfair termination. To support his argument, he referred the court to the case of **Rajabu Mbilanga vs Shield security Serviceltdrev**, 113 (2019) at Dar es Salaam (unreported) where the Court held that, principles of unfair termination do not apply to specific tasks or fixed term contracts which come to an end on the specified time or completion of a specific task.

He submitted further that, despite the respondent's misconduct, the applicant found it reasonable to mutually terminate the contract by signing a settlement deed. He maintained that, where an employer is terminated based on misconduct, he is not entitled to severance pay under section 42(3) of the Employment and Labour Relations Act, 2004. The proper claim by the respondent ought to have been a 30 days' notice. The act of the CMA to award a 12-month compensation defeated the purpose of the Act. The respondent was supposed to return the money he received before referring the matter to the CMA. He maintained further that, by awarding the respondent 12 months' compensation the CMA defeated the purpose of the provision.

Submitting further, he argued that by signing the settlement agreement the respondent waived all other remedies subject to the agreement. He maintained that, the applicant would have rejected the money given to him before going to the CMA.

He maintained that it is not disputed that the respondent committed gross misconduct and caused loss to the applicant and the applicant has already paid him severance pay. Thus, according to the principle in the case of **Vedastus Ntulanyeka and 6 Others vs Mohamed Transltd**, Revision No. 4 of 2014 (unreported), where there is a substantive fairness and procedural unfairness the proper compensation is 6 months.

He implored the court to consider the applicant's good intention in ending the matter out of court by settlement between parties and urged the court to allow this application.

In reply, the respondent submitted that, the Commission was satisfied that the respondent was wrongfully terminated having taken into consideration the evidence and testimony of both parties that, the applicant terminated the contract on their own without giving reasons for termination or following the proper procedures required by the law. Hence, an order for payment of 12 months salaries for unfair termination. He referred the court to the case of **Tiscan Limited vs Revocatus**

Simba, Revision No. 8 of 2009 (unreported) and maintained that the award given was justifiable under section 40 (1) of the ELRA.

From the submissions and records of this matter, it is apparent that the central issue for determination is whether the CMA award was properly procured and whether the award was justifiable.

In their letter of termination, the applicant alleged that the respondent was terminated due to gross misconduct. Evidence adduced at the CMA reveals that the respondent was warned a number of times due to his behaviour and he was once terminated due to misconduct. Thus, the applicant could have a good reason for terminating the applicant's contract under section 37 (2) of the Employment and Labour Relations Act, 2004. However, the question for determination is whether the procedure for termination was fair.

Section 37 (2)(c) of the Employment and Labour Relations Act, 2004, provides in section 37 (2) (c) that a termination of employment by an employer is unfair if the employer fails to prove that the employment was terminated in accordance with a fair procedure. The procedures for termination are provided under Rule 13 of the Employment and Labour Relations (Code of Conduct and Good Practice) Rules, G.N. No. 42 of 2007.

The cited provisions require the employer to conduct investigation before a disciplinary hearing is conducted so as to ascertain the offence alleged to have been committed by the respondent. In the present case, the records of CMA reveals that no disciplinary hearing was conducted prior to the termination of the respondent's conduct. The applicant alleged that the disciplinary hearing was ruined by the applicant's failure to attend the meeting. Thus, they decided to settle the matter amicably.

Rule 13 (6) of G.N. No. 42 of 2007 provides that;

> *"Where an employee unreasonably refuses to attend the hearing, the employer may proceed with the hearing in the absence of the employee".*

Based on the cited provision, it is clear that the applicant was required to proceed with the disciplinary hearing in the absence of the respondent. Thus, the applicant's reason for not holding the disciplinary hearing is a mere excuse and legally untenable.

Further to that, this Court examined the deed of settlement allegedly signed between the applicant and respondent as a mutual agreement for amicable settlement of this matter. The Court noted that although the deed was meant to be the final settlement of the entire dispute, it was entered between the applicant and one Athumani Issa Mwenda who is not privy to this application while the last page appears

to have been signed by one Otieno Kambrus Ogalo. The Court finds to rely on the said settlement deed on account of the said ambiguity.

On the question of proper compensation to be awarded, the law lays down the reliefs to be awarded in case an employee is unfairly terminated. Section 40 of the **Employment and Labour Relations (Code of Good Practice) Rules** GN. 42 of 2007 provides that: -

> *"If an arbitrator or Labour Court finds a termination is unfair, the arbitrator or court may order the employer-*
>
> *(a) To reinstate the employee from the date the employee was terminated without loss of remuneration during the period that the employee was absent from work due to the unfair termination; or*
>
> *(b) To re-engage the employee or any terms that the arbitrator or court may decide; or*
>
> *(c) To pay compensation to the employee o f not less than twelve months' remuneration."*

On the basis of the provision alluded to above, I find that, the CMA was right to order for payment of compensation for 12 months having held that the respondent was unfairly terminated. With regards to other payments such as leave and bonus, this Court join hands with the Arbitrator in holding that no proof was adduced to ascertain the same and therefore the CMA was right to disregard them.

In the end, I find no need to fault the Arbitrator's award. Consequently, this application is hereby dismissed for lack of merit.

It is so ordered.

K.N.ROBERT
JUDGE
20/10/2021