IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISRTY OF ARUSHA

AT ARUSHA

REVISION NO. 80 OF 2020

(Arising From Labour Dispute CMA/ARS/ARS/693/19/98/20)

BETWEEN

BURKA COFFEE ESTATE LIMITED..... APPLICANT

VERSUS

SELEMANI SALIMU SIMA.....RESPONDENT

JUDGMENT

11/5/2022 & 29/6/2022

ROBERT, J:-

This is an application for revision of an award of the Commission for Mediation and Arbitration (CMA) in Labour Dispute No. CMA/ARS/ARS/693/19/18/20) delivered on 14/08/2020. The respondent, Selemani Salimu Sima, filed a complaint at the CMA against the applicant, his former employer, alleging unfair termination. After a full trial, the CMA made a finding that the respondent's termination was unfair since the applicant did not adhere to the principles of fair hearing. Aggrieved, the applicant preferred this application seeking to revise the CMA award.

The records reveal that the respondent was employed by the applicant on 1st day of January, 1992 as a Supervisor of workers at the Applicant's farm and on 14/8/2019 took some workers from the employers to work in his farm during the employees' working hours. As a consequence, he was terminated from employment. After a full trial, the CMA held that the termination was both substantively and procedurally unfair thus ordered the applicant herein to pay the respondent TZS 3,339,534/= and to issue the complainant a certificate of service as per section 44(2) of the Employment and Labour Relations Act. Aggrieved, the applicant preferred the present application based on the following legal issues:

1. *That, the arbitrator erred in-law and in fact by holding that the respondent used the applicant's manpower during the brake time while he admitted the offence through the latter (sic) he wrote by his own hand.*
2. *That, the arbitrator erred in law and in fact that he did not conceder (sic) that break tie is within the working hours.*
3. *That, the arbitrator erred in law and in fact by not considering the weight of the applicants evidence and document tendered.*

When this application came up for hearing the applicant was represented by Mr. Frank L. Maganga, personal Representative whilst the respondent was represented by Mr. David Makaya, secretary of TIPAWU.

Hearing proceeded by way of filing written submissions as requested successfully by parties.

Submitting in support of the first ground, Mr. Maganga faulted the Hon. Arbitrator for holding that the respondent used the manpower from his employer during break time contrary to what the respondent admitted in his offence (See exhibit D2). He noted that the Arbitrator relied on exhibit P2 and not exhibit D2 while the said exhibits were written by the same person and as a result believed that the respondent admitted the offence charged after being solicited by the Human Resource Manager that the matter would be quickly settled while there was no proof to that effect.

He explained that the working hours as specified in Article 3.1 of the Employment Contract includes break time and the Respondent admitted that he committed the offence within 7.5 hours which is considered as working hours. He maintained that the respondent violated Article 3.1 and 4.1 of the Employment Contract.

Responding to this ground, the respondent argued that he did admit to have requested three employees to help him during break time but he never admitted to the alleged offence and the applicant failed to prove that the respondent committed the alleged offence. He maintained that, the applicant's witnesses were inconsistent and contradicted each other,

DW1 stated that the private job was done at 8:30 am while DW2 said it was done between 10:45 to 11:00 am and DW3 said it was 08:00 am to 11:30 am (See page 8 of the CMA Award). He maintained that the employees alleged to have worked at the respondent's farm were requested by the respondent to help in the farm but had not worked for the respondent.

Coming to the second ground, Mr. Maganga submitted that this ground is already covered by the submissions of the first ground. In response, the Respondent submitted that page 8 of the CMA's award made it clear that the respondent did not use the applicant's employees during working hours.

Highlighting on the last ground, Mr. Maganga argued that it was wrong for the Hon. Arbitrator to ignore exhibit D2, the letter written by the respondent himself admitting allegations of use of the applicant's manpower from break time to 15 minutes after the break time.

He maintained that, evidence shows that the applicant followed the required procedures before terminating the respondent. Further to that, he argued that since the respondent had admitted to the charges against him there was no need for disciplinary hearing. To bolster his argument,

he cited the case of **CMA/CGM TANZANIA L.T.D vs Justine Baruti**, Rev. No. 28 of 2016.

He faulted the Hon. Arbitrator for believing on the evidence adduced by the respondent which was not proved instead of considering the applicant's evidence which was well proved before him.

Responding to the last ground, the respondent contended that inconsistencies and contradictions in the evidence adduced by the applicant's witnesses as indicated in the first ground shows that the applicant failed to prove fairness of the respondent's termination. Further to that, the procedures for termination as envisaged under Rule 13 of the Employment and Labour Relations (Code of Good Practice) Rules, 2007 (GN 42/2007) were not followed by the applicant (See page 9 of the CMA's award).

With regards to the case of **CMA/CGM Tanzania Ltd vs Justine Baruti** cited by the Applicant to establish that once a charged employee admits to the offence he is charged with there is no need of conducting a disciplinary hearing, he argued that, the cited case is distinguishable from this case as in this case due to the fact that in the present case the applicant conducted disciplinary hearing but the procedures were not complied with and the respondent did not admit to the charges.

Thus, it was their submission that this Hon. Court to find the applicant's application had no merit and the same be dismissed.

In his brief rejoinder, Mr. maganga submitted that the termination procedures under Rule 13 of GN No.42 of 2007 are not to be followed on a checklist fashion as the employer may depart from some of the procedures depending on the circumstances of termination. He cited the case of **Mantra Tanzania Limited vs Daniel Kisoka**, revision No. 267 of 2019 where the court agreed with that argument.

Having considered submissions of both parties and examined records of this matter, I find the following issues relevant in the determination of this matter. One, whether the applicant's termination was substantively fair. Two, whether the applicant's termination was procedurally fair. Three, what reliefs are the parties entitled to.

Starting with the first issue, section 37 (2) of the Employment and Labour Relations Act, No. 4 of 2004 provide that;

> *"A termination of employment by an employer is unfair if the employer fails to prove-*
>
> *(a) that the reason for the termination is valid;*
>
> *(b) that the reason is a fair reason –*
>
> *(i) related to the employee's conduct, capacity or compatibility; or*

(ii) based on the operational requirements of the employer, and

(c) that the employment was terminated in accordance with a fair procedure.

From the quoted provision, it is clear that the law requires the employer to have a valid and fair reason before terminating an employee. In the instant case, the reasons for the respondent's termination, according to the termination letter dated 09/09/2019, are:

1. "Kuwatoa wafanyakazi uliokuwa unawasimamia kwenda kufanya kazi zako binafsi. (Literally meaning, to take employees under your supervision to do your personal work.
2. Kutumia rasilimali watu za mwajiri wako vibaya ambazo ni nguvukazi za mawajiri bila idhini ya mwajiri. (Literally meaning, unauthorized use of employer's resources particularly the employer's manpower)
3. Kutumia muda wa mwajiri vibaya kwa kufanya kazi zako binafsi wakati wa saa za kazi za mwajiri. (Literally meaning, misuse of employer's time for personal work during working hours).

I have noted that Respondent's allegations were contained in exhibit P1 dated 16/8/2019 as well as exhibit P3 dated 27/8/2019. Both documents were written by the employer to notify the employee of the allegations facing him and asked him to respond to the said allegations.

The first document (exhibit P1) had two allegations whereas the second document (exhibit P3) had three allegations. It is not clear if the second set of allegations replaced the first set of allegations or the employee stood charged with both sets of allegations.

Further to that, both sets of allegations against the respondent did not make reference to the provisions of the Code of Conduct or Employer's Policy alleged to have been violated by the employee's conducts. Similarly, while allegations against the respondent were mainly related to unauthorised use of employees under his supervision for his personal work during working hours, the allegations contained in the two documents (exhibit P1 and P3) do not make reference to the date and time when the alleged offences were committed.

Most importantly, while the employer considered the employees letter dated 17/8/2019 (exhibit D2) as admission of offences by the employee, it is clear that the said letter was written prior to the latest set of allegations against the employee (exhibit P3) which is dated 27/8/2019. Further to that, in the said letter, the employee indicated that he asked for help from three employees during break time. It is not clear from the evidence presented if the employees were allowed or not allowed to do any other work apart from the employer's work during break time.

On the basis of the findings made, this Court holds that the Respondents reasons for termination were unclear and unproven and therefore neither fair nor valid.

Coming to the second issue, whether the applicant complied with the procedures as required by the law before termination. Rule 13 of the **Employment and Labour Relations (Code of Good Practice) Rules**, GN 42 of 2007 provides an elaborate procedure to be followed by the employer before terminating an employee.

Having examined the records of this matter, this Court noted a number of procedural faults in the termination of the respondent. First, this court considers the time of one day given to the respondent to respond to the allegations against him to be unreasonable (see exhibit P1). The employee is entitled to a reasonable time to prepare for response for allegations against him.

Further to that, records reveal that, in conducting disciplinary hearing, DW1 (Sia Makishe), who was the secretary of the hearing committee is the one who initiated the disciplinary process by preparing allegations against the Respondent and signed the respondent's termination letter. Her role in the termination process made her a judge in her own cause which is against the principle of "Nemo judex in causa

sua" which requires that, no one should be a judge in his own cause. In the circumstances, this Court finds and holds the respondent's termination procedurally unfair.

Having confirmed the respondent's termination to be both substantively and procedurally unfair, this Court finds no reason to fault the reliefs granted by the CMA. As a consequence, I dismiss this application for want of merit.

It is so ordered.

K.N.ROBERT
JUDGE
29/6/2022