IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT ARUSHA

REVISION APPLICATION NO. 5 OF 2020

(C/f Labour Dispute No CMA/ARA/ARS/130/2019)

PATRIOTIC SECURITY COMPANY LTD ..... APPLICANT

VERSUS

ISSA MLANGI ..... RESPONDENT

JUDGMENT

26/05/2022 & 30/06/2022

KAMUZORA, J.

The Applicant Patriotic Security Company Ltd brought this application under the provision of section 91(1)(a) (b) and 91 (2)(a)(b)(c), 94(1)(a)(b) and 94 (1) (b) (i) of the Employment and Labour Relations Act No 6 of 2004 and Rule 24(l)(2)(a)(b)(c)(d)(e)(f), 24(3)(a)(b)(c)(d), 28(l)(c)(d)(e) of the Labour Court Rules, 2007, GN No. 106 of 2007. The Applicant is seeking for the revision of the proceedings of the Commission for Mediation and Arbitration (CMA) in CMA/ARS/ARS/130/19. The application was supported by an affidavit

sworn by the Applicant himself and strongly opposed by the Respondent through a counter affidavit sworn by the Respondent himself.

The brief facts leading to this current application is such that, the Applicant employed the Respondent as a security guard and was paid Tshs 140,000/= per month. The Applicant on 20/3/2019 terminated the Respondent from his employment contract for an allegation of absenteeism from work for four days and incompatibility with his superiors. Dissatisfied with the said termination the Respondent instituted a complaint against the Applicant claiming for unfair termination and prayed for compensation for unpaid salaries, leave, notice, terminal benefits and certificate of service. The CMA issued an award that the Respondent was unfairly terminated from his employment and awarded him compensation and terminal benefits to the tune of Tshs 2, 025,385/= and an order for a certificate of service. Being dissatisfied the Applicant preferred this current revision application on the following grounds: -

1. *That, the honourable Arbitrator refused/ignored without good reasons to admit all Applicants evidence/documents showing that Applicant had good reasons for terminating the Respondent from employment.*

2. *That, the honourable Arbitrator erred in law by disregarding the Applicants evidence which led him to come up with erroneous finding which has no legal basis and proper reasoning.*
3. *That, the Honourable Arbitrator misconducted himself by adopting double standards when considering the evidence that was adduced by the Respondent on the other hand, thereby arriving at wrong decision.*
4. *That, the Honourable Arbitrator error in law and fact when deciding the dispute on the question by misconducting himself and failed to consider, whether there was valid reason for termination as result reached in the erroneous conclusion.*

Hearing of the application was by way of written submissions whereas the Applicant was represented by Alex Michael from Wasangi Employment Solution while the Respondent appeared in person with no legal representation. Both parties filed their respective submissions as scheduled save that the Applicant did not prefer to file a rejoinder submission.

Arguing in support of application the Applicant submitted that, the arbitrator dealt with the procedural aspect of termination in a checklist fashion against the settled position of law under Rule 4(1) (2) GN No. 42/2007. That, the records show that the Respondent had a fixed term contract and before the employer decided to institute a disciplinary

charge against the Respondent it took time to ascertain as to whether the employer will show off but in vain. That, the Respondent was charged on February 2019 and was summoned to show cause as per exhibit P5. That, a number of adjournments was done by the panel until the day the Respondent entered appearance with his representative from TUPSE. That, the process was fair and fully complied to the principle of natural justice and fairness even though the Respondent had a fixed term contract. That, exhibit P3 which is the attendance register gives details on the evidence of absenteeism by the Respondent who contested it but failed to account for his absence hence termination by absenteeism.

In alternative to the above argument the Applicant also raised point of law on whether the matter was competent before the Commission CMA. He submitted that, it is unprocedural for the Respondent to mix two prayers which are distinct and not related in a single application. He alleged that, the CMA F1 filed at the CMA contained the prayers of termination of employment and dispute for claims in a single application. That, such act contributed to the non-citation of the relevant provision of law and ended up confusing the court and the parties. He was of the view that, the proper procedure

was for the Applicant to file a dispute for unfair termination within 30 days from the date of termination and the second dispute of claims within 60 days at a separate CMA F1 and not in a single form. He maintained that, the dispute is omnibus as it contained two prayers in a single form. In the strength of the submission made above, the Applicant prays for this court to quash and set aside the CMA award.

Responding to the revision application, the Respondent submitted on the issue of unfair termination that, there is no tangible evidence that was tendered at the CMA to prove absenteeism from 27th, 29th February 2019 and 1st March 2019. He referred section 39 of the Employment and Labour Relations Act No. 6 of 2004 and submitted that, the law requires the employer to prove that the termination is fair which the Applicant failed to prove. That, the disciplinary hearing was not conducted before terminating the Respondent rather a mere meeting between the Applicant and the management while rule 4(1) and (2) of GN No. 42 requires that hearing be conducted by an impartial hearing committee. In support of the submission, he cited the case of **Elias Kasalile and 20 others Vs. Institute of Social Work,** Civil Appeal No 145/2016 CAT at DSM (Unreported).

The Respondent further submitted that, the Applicant violated the basic rights of natural justice on the right to be heard hence violation of section 37(3) of the Employment and Labour Relations Act and Rules 8,9,11,12,13,17,18 and 19 of the Employment and Labour Relations (Code of Good Practice) which regulates termination of employment. Basing on the strength of the submission made above the Respondent prays that the application be struck out for lack of merit.

That being the summary of the submission made by the parties in respect of this application, the pertinent matter that calls for the attention of this court is whether the CMA was right to have treated the Respondent as having been unlawfully terminated from his employment contract. The burden of proof in labour matters lies upon the employer to prove that the employee was fairly terminated and the procedures for termination were followed as per section 39 of the Employment and Labour Relations Act No. 6 of 2004. The Applicant claimed in his affidavit that the arbitrator ignored to admit all the Applicants evidence showing that the Applicant had good cause for terminating the Respondent.

I have revisited the records of the CMA and the submission by the parties. It is clear from the record that the Respondent was accused of absenting himself from work without justifiable reasons. The Applicant

referred exhibit P3 as proof of the allegation that the Respondent did not attend at his work place on the specified dates. There is no dispute that the Respondent was not at work for four days, and the alleged exhibit P3 is the Respondent letter explaining the reasons for not attending the work. He claimed that he was sick and issued with ED and exhibit D1 proves such fact. I therefore agree with the CMA finding that there was no good reason for the Respondent's termination.

On the procedure for termination, I also agree with the CMA finding that the Applicant did not comply to the procedures for termination. The records show that, even after the Respondent had explained under exhibit P3 that his absence was due to sickness, he was suspended for 14 days and thereafter terminated from employment. But there are no records showing that the disciplinary hearing was conducted before the Respondent was issued with termination letter. The Applicant claimed that the Respondent was summoned to show cause under exhibit P5 but upon examining the said exhibit I discovered that the same is irrelevant as it is a 2016 letter by the Respondent applying to retire. There is evidence that even after that letter the Respondent continued working with the Applicant until when he was terminated on 2019. Under section 37(2) (c) of the Employment and

Labour Relations Act No. 6 of 2004, the termination of employment is unfair if the employer fails to prove that the termination was according to fair procedures. As there is no evidence tendered before the CMA showing that the disciplinary hearing was conducted by the Applicant before terminating the Respondent, such omission is a fundamental irregularity because it denied the Respondent his right to be heard. I therefore hold the CMA view that, the Respondent was unfairly terminated from his employment.

On the allegation that the Respondent was working under a fixed term contract, I have perused the CMA records but I was unable to see evidence to that effect. There is no employment contract that was tendered before the CMA to verify the employment contract of the Respondent. Therefore, I will not bother much on that issue considering the legal requirement on the burden of proof.

The Applicant also raised an issue that there was omnibus prayer in the sense that one form was used to raise two claims. I have revisited the said CMA F1 and discovered that, on the part of '*Nature of Disputes*', the Respondent did tick the item of '*termination of employment*' and on the item of *'others'* did write MADAI. I do not see if there are two claims as so alleged by the Applicant. The word MADAI did not specify if there

were other claims apart from those found under unfair termination claimed by the Respondent. To me I see no defect and if so, I expected the Applicant to state categorically the provision of the law that was violated and remedy therefrom. Since there is no explanation to that effect, I find that the writing of word MADAI in CMA F1 is not fatal to the proceedings before the CMA.

In the final analysis, the contention that the CMA ignored the evidence of the Applicant is baseless. The CMA rightly considered the evidence on records and I do not see any reason to interfere with the CMA award. This application is therefore devoid of merit and it is hereby dismissed with no order for cost considering the nature of dispute being a labour dispute.

DATED at **ARUSHA** this 30th day of June, 2022.

D.C. KAMUZORA

JUDGE