IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IRINGA DISTRICT REGISTRY)

AT IRINGA

LABOUR REVISION NO. 17 OF 2020

(Originating from Labour Dispute No. CMA/IR/65/2020 before Hon. Fortunatha Muzee, the Arbitrator)

MPUTA SECURITY SERVICEGUARD CO. LTD.....APPLICANT

VERSUS

MAGDALENA MALINGUMU .....RESPONDENT

RULING

Date of last Order: *22/03/2022*
Date of Ruling:*27/07/2022:*

MLYAMBINA, J.

The Applicant, Mputa Security Guard Company Limited filed this application seeking for revision of the Award issued by the Commission for Mediation and Arbitration for Iringa (herein referred as the CMA) in *Labour Dispute No. CMA/IR/65/2020* dated 19th November, 2020. The CMA decided the complaint in favour of the Respondent herein by declaring that the Respondent employment was terminated unfairly and ordered the Applicant herein to pay the Respondent terminal benefits including; twelve months salary as a compensation, one-month payment *in lieu* of notice and severance payment. The application was made under *section 91(l)(b),(2)(a)(b) and 94 (1), (b)(1) of the Employment*

and Labour Relation Act No. 6 of 2004 read together with *Rules 24 (1)(2) (a)(b) (c)(d)(e) and (f), (3) (a) (b) (c) and (d); 28 (l),(c),(d) and (e) of the Labour Court Rules, GN No. 106 of 2007 published on 18/5/2007.* It was supported with an affidavit sworn by one Abraham L. Muhoja, the Applicant's Human Resource Officer.

The background of the matter, as per the CMA records and documents filed in this Court by the Parties is to the effect that; the Respondent herein was employed by the Applicant as Regional Manager who has to work on behalf of the Director. Also, he worked as a Regional Financial Officer. On 6th July, 2020, he received a termination letter dated 20th April, 2020, in which the reason for his termination was stated to be; misconduct due to the Applicant's refusal to be transferred and destruction of the employer's credentials. The Applicant lodged his complain before the Commission for Mediation and Arbitration (henceforth CMA) where the complaint was decided in his favour. The Applicant herein was aggrieved by the Award. Hence, he lodged this application for revision.

The grounds upon which the Applicant is inviting this Court to revise the Award are deposed at paragraph ten of the affidavit supporting the application, as follows:

a) *The Arbitrator was improper as she failed to comprehend that it was illegal to join two (2) registered disputes separately with different amount claimed and cause of actions.*

b) *The Respondent now Applicant never though that CMA abruptly can join dispute filed separately without the consent of the parties or the Applicant to amend the pleading,*

c) *The Arbitrator not considered the exhibit DW1E tendered by the second witness LUKANUS N. KAYOMBO a document without figures of money required where it was difficult the Respondent now Applicant to predict the real amount for fare to Tabora from Iringa Respondent for her transfer. On 04/02/2020 absconded duty was not seen till after 72 days appeared at TUPSE where absconding was confirmed as Annexed marked DWIH.*

d) *The Applicant now Respondent her resident domicile is at Tabora and produced proforma invoice for the belonging's transportation at TUPSE*

she admitted that, 50,000/= was enough fare to Tabora from Iringa Annexed and marked DWIF.

e) *The Applicant now Respondent required house or room rent for three months at Tabora without to mention the real amount of money per month and she did not go to Tabora to search accommodation,*

f) *The Applicant now Respondent was informed to report at Tabora before 5th February, 2020 but she wrote the figureless letter on 4th February, 2020 on the end day. Annexed and marked DWIA,*

g) *The Applicant now Respondent handed over to the coming staff Jacob T. Mwanjila on 02/02/2020, there was no second handling over or stay of the transfer without consent from the Managing Director Dodoma. He collected 400,000/= illegally Annexed and marked DWIA.*

By consent of the Parties, this application was argued by way of written submission. Both Parties appeared in person without any legal representation, fending for themselves. The Applicant submitted that;

the CMA registered two complaints which were filed by the Respondent against the Applicant. At the first complaint, the CMA before determined the complaint, ordered the Complainants to appear before TUICO for mediation and they had to return the report in whatever result on 16th July, 2020. The end result was that, the Respondent did not deserve to be paid terminal benefit because he terminated himself from his employment. On 16th July, 2020 after receiving the report, another complaint was lodged and registered as CMA/ IR/65/2020 in which the Respondent claimed the same relief claimed in the first complaint but the amount increased to 5,267,384.60/=

During the hearing of the second complaint, the Respondent adduced evidence which was supposed to be submitted in the first complaint. The CMA neither directed him nor said anything on that issue. Therefore, the CMA decision to register two complaint caused the confusion and for justice to be done, the Applicant prayed to the Court to overrule the CMA decision dated on 19th November, 2020.

In his reply, the Respondent contested the application. He submitted that the Applicant terminated his employment unfairly. His right to be heard was denied before termination contrary to *Rule 9(1), (5), Rule 12 (1) (a) and Rule 13 (1) (2) (3) and (50of GN NO. 42 of 2007 of The*

Employment and Labour Relation (Code of Good Practice) Rules to wit all the termination process are nullity as the allegation was not proved before any legal meeting. The evidence which was adduced by Mr. Hatibu Baweni, Secretary of the Workers Association (TUPSE) shows that the complaint before him was for the Applicant failure to pay the Respondent his transfer allowance which was paid later.

It was submitted by the Respondent in reply that; on 16th June, 2020 the Respondent lodged a complaint before CMA with registration *No. CMA/IR/49/2020.* He prayed to be paid the remaining amount of money for his transfer TZs 2,503875.70. The complaint was scheduled for mediation on 6th July, 2020 but on the same date, he received a termination later dated on 20/04/2020. Therefore, he withdrew the application and opened another complaint on unfair termination and other reliefs amount due 5,267,384.60.

According to the Respondent, the complaint which was determined by CMA was *CMA/ IR/65/2020* which was filed on 16/07/2020. Unfair termination is guided under the provision of *section 37(1) (2) (a) (b) (i) (ii) and (c) of the Employment and Labour Relation Act, No. 6 of 2004 and Rule 12 (1) and 13 (1) (2) (3) (4) G. N. No. 42 of 2007.* As a matter of facts, the second CMA complaint was a result of the illegal conspiracy

act of the employer and TUPSE who intentionally and illegally decided to deduct the payment. In order to fulfil their illegal act, they planned to terminate his employment only three days after the payment.

It was the reply submission that; before the CMA, the employer failed to prove his allegation against the Respondent which resulted to his termination. According to the Respondent, decision of any case has to be based on the concreate evidence which are relevant to the pertinent issues. The CMA was right to decide into the Respondent favour as the Applicant arguments has no merit. He contended further that, the CMA favoured the Applicant by reducing the amount claimed by the Respondent from TZs 5,267,384.60/= to TZs 2,815,385/=. For that reason, he was not supposed to lodge this application. He prayed this application to be struck out.

In his rejoinder, the Applicant reiterated that at the hearing date of the second complaint, instead of testifying in relation to the second complaint, the Respondent testified in relation to the first complaint which lead the CMA to deal with the two complaints. The Applicant reminded this Court that the Respondent transfer was a normal transfer. He agreed and later wrote a letter in which he asked for the fare but he did not specify the amount

After being paid transport allowance, the Respondent was nowhere to be found. So, it was difficult to call disciplinary meeting. He was not terminated either. After 72 days he went to TUPSE claiming that he was not being paid his transfer allowance due amount 3,970,000/=. The letter dated 20/04/2020 was to inform the Respondent that he absconded from work from 4/2/2020, to wit, the relation under *section 61 (a) (b) (c) (d) and (f) of the Act No. 7 of 2004* is no more.

The Applicant insisted further that the CMA erred in law for registering two different complaints. The Respondent conceded to struck out the first *complaint No. CMA/IR.49/2020* by virtual of the letter dated on 11/12/2020 and the CMA decision was on 19/11/2020. It is illegal for the employee to claim benefits from his employer 72 days after he terminated his employment. The Applicant insisted that, the Respondent's intention was to mislead the Court to award him the benefit he do not deserve which raised from complicated hearing.

It was the rejoinder submission of the Applicant that; the Respondent agreed to withdraw the first complaint which he testified upon. The CMA erred to decide the complaint which there was no evidence adduced in relation to. He prayed for the Court to reverse the CMA decision and any other order the Court deem fit to grant.

Having carefully considered the submissions made to the Court by both sides and after going through the affidavit filed in this Court by the Applicant to support the application and the record of the CMA, the Court is of the view that the issue for determination in this matter are as follows:

(1) *Whether the CMA entertained two application lodged by the Respondent against the Applicant.*

(2) *Whether the Applicant terminated the Respondent employment unfairly.*

(3) *What reliefs are available to the Parties.*

Starting with the first issue which is based on the ground raised under paragraph 10 (a) and (b) of the supporting affidavit, thus; *whether the CMA entertained two application lodged by the Respondent against the Applicant.* I went through the record of the CMA and noted, as rightly as submitted by the Applicant, there were two complaint filed by the Respondent against him. First, it was the complaint with registration *No. CMA/IR/49/2020* in which the Respondent claimed to be paid transfer allowance. Second, it was the complaint lodged on 16th day of July, 2020 registered as *CMA/IR/65/2020* in which the Respondent prayed to the Court to be paid compensation and other terminal benefit

as a result of unfair termination by the Respondent. It is quite clear from the CMA record that; although there were two complaint lodged before the CMA, only the second complaint (CMA/IR/65/2020) was heard and determined to the finality. There is also a presumption that a Court record accurately expressed what happened. This was held in the case of **Halfani Sudi v. Abieza Chichili [1996]** TLR 257. Therefore, the CMA did not entertain both complaints lodged by the Respondent, as the Applicant wants this Court to believe.

The second issue is; *whether the Applicant terminated the Respondent employment unfairly.* There is no dispute as to whether the Respondent was employed by the Applicant or his employment was terminated by the Applicant. According to the termination letter dated on 20th April, 2020, the Applicant terminated the Respondent employment on the ground of misconduct. From the record, there is no any evidence which elaborates when and how the Respondent misbehaved. It is a requirement of the law that; the employer is the one to prove if the Respondent termination was fair and not otherwise. It is the firm view of this Court, the standard of proof of any fact relating to termination of employment in labour matters is on balance of probability and not beyond reasonable doubt as stated by the CMA. The above

finding of this Court is getting support from *section 39 of the ELRA* read together with *Rule 9 (3) of the Employment and Labour Relations (Code of Good Practice), GN No. 42 of 2007.*

The above cited provisions of the law states clearly that; in any proceedings concerning unfair termination of an employee, an employer is required to prove on balance of probability that the reason for termination of employment of an employee was fair. The law gives mandate to the employer to terminate the employee employment but only if there is reason to do so and the procedure as provided by the law, are adhered to. In the case of **Tanzania Railway Limited v. Mwajuma Said Semkiwa,** Labour Revision No. 239 of 2014 at Dar es Salaam, it was held *inter alia* that:

> It is established principle that for the termination of employment to be considered fair it should be based on valid reason and fair procedure. There must be substantive fairness and procedural fairness of termination of employment.

Being guided by the above quoted authority, the Applicant did not afford the Respondent with the right to be heard, which is the most fundamental component of justice. Failure to that, it lender the

termination nullity.

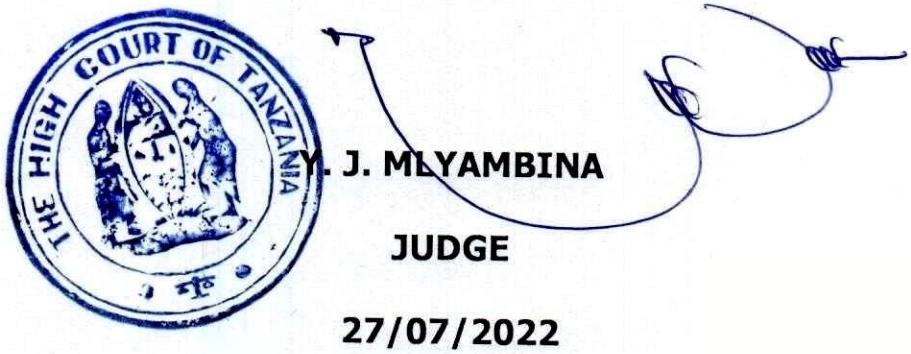
In the premises, I have no reasons to fault the decision entered by the CMA. On this juncture, I hereby dismiss this application. It is so ordered.

Y. J. MLYAMBINA

JUDGE

27/07/2022

Ruling delivered and dated 27th day of July, 2022 through Virtual Court in the presence of Abraham Lucas Mhoja (Human Resource Manager) for the Applicant and Ignas Charaji Representative of the Respondent. Both Parties were stationed at the High Court of Tanzania Iringa District Registry's premises. Right of Appeal fully explained.



Y. J. MLYAMBINA

JUDGE

27/07/2022