IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

LABOUR REVISION NO. 13 OF 2021

(C/F CMA/ARS/732/18/25/19)

FUNIRTURE COLLECTION LIMITED.....APPLICANT

VERSUS

ALLY SALEHE PAPA.....RESPONDENT

JUDGMENT

08/11/2021 & 11/02/2022

GWAE, J

This is an application for revision which was brought by the applicant, **Furniture Collection Limited** against her former employee, **Ally Salehe Papa.** The applicant is seeking revision of the Commission for Mediation and Arbitration (CMA) delivered on the 19th February 2021 in favour of the respondent. The CMA's decision was to the effect that, respondent's termination was for an invalid reason and procedures for his termination were also not adhered to, it was therefore ordered that, the applicant to pay the respondent twelve (12) months' compensation together with other terminal benefits.

The application is supported by the affidavit of one Said Kondo, the applicant's director, principal officer and an immediate supervisor for all applicants' operations. It is in the affidavit where grounds for the sought revision are demonstrated, these are;

1. That, there were errors material to the merits of the matter before the CMA involving injustice
2. That, the learned arbitrator failed to analyze overall evidence adduced before by the parties, he thus ended to an erroneous conclusion as he did whereas the respondent confessed to his misconducts and that the applicant strictly followed termination procedures

On the other hand, the respondent strongly opposed the application through the counter affidavit sworn by the respondent's representative Mr. Leonard David, an assistant Secretary from trade union (CHODAWU).

At the hearing of this application the applicant was represented by the learned counsel Mr. Asubuhi John Yoyo while the respondent appeared in person unrepresented. With leave of this Court, hearing of the application was by way of written submissions.

In support of the application the applicant submitted that; on procedural aspect; the purported denial of the right to appeal was a misconception by the learned arbitrator on the reason that the applicant being a limited company the top administration organ was the board of directors which is the one and same that terminated him, therefore it was a misconception to expect an appeal as there was no an appeal organ according to the company set up.

Secondly, on the denial of the right to mitigate, it was the submission of the applicant's learned counsel that, there was a fatal misapprehension of the records. According to him exhibit D6, the hearing form Item 9 reveals that the respondent was given an opportunity to mitigate when questioned as to whether he was willing to be pardoned and taken back to work but he plainly refused.

Thirdly, the counsel submitted that the learned counsel that the Commission failed to evaluate the evidence properly. According to him the applicant through her witnesses together with documentary evidence did prove the absenteeism of the respondent. He further added that even though the respondent was charged with two offences nevertheless he was found

guilty of one offence only and even his defence of sickness was not proven by tangible evidence.

Fourthly, Mr. Yoyo submitted that it is undisputed that the chairman of the disciplinary committee is a senior officer of the applicant and that there were no signs of unfairness or biasness nor was he involved in the matters giving rise to the dispute as wrongly apprehended by the learned arbitrator.

Fifthly, on the aspect of omission to conduct investigation, it is the submission of the applicant that the circumstances of the case did not require investigation as the respondent was not suspended but rather disappeared from his working station. The counsel added further that the admission letter written by the applicant (DE2) is a sufficient prove which did not require the applicant to conduct an investigation. He concluded that the overall process of terminating the respondent was fair-minded.

As far as reasons for termination is concerned, Mr. Yoyo submitted that there were gross errors and misdirection on the reasoning made by the Commission when holding that the respondent was terminated on unfair reasons. According to him the applicant had sufficiently established through her witnesses and documentary evidence that the respondent was absent

from his working place as can be seen through exhibit D6, the disciplinary hearing form. On the aspect that the applicant did not take immediate action for four months, it is the submission of the learned counsel that there is no limitation of the period within which the action must be taken all that is required is reasonability depending on the circumstances of the case he went on submitting that even when the attendance register is considered not to be good evidence yet there is still strong evidence through his witness Said Kondo and exhibit D6 the disciplinary hearing form.

In his response, the respondent's counsel principally supported the award of the Commission by stating that he was, as correctly procured by the CMA, unfairly terminated both in substantive and procedural aspect. Hence, he prayed this application be dismissed for lack of merit.

Having deeply considered the application, parties' written submissions together with the records, this court is of the view that the issues to be determined by this court are;

1. Whether the Commission was justified to hold that the respondent was terminated on unfair reasons.

2. Whether the Commission was justified to hold that the applicant did not adhere to the proper procedures in terminating the respondent.

3. Whether the reliefs awarded were legally justified.

On the first issue, as to whether the respondent's termination was on invalid reasons. The provision of the law under section under Section 37 (2) of the Employment and Labour Relations Act Cap 366 Revised Edition, 2019 (Act) provides that it shall be unlawful for an employer to terminate the employment of an employee unfairly. In our instant case, the respondent was terminated for alleged reasons of absenteeism from work without his employer's permission or any other excuse justifying his absenteeism.

Under the Employment and Labour Relations (Code of Good Practice) GN 42/2007 first item on the heading entitled *offence which may constitute serious misconduct and leading to termination of an employee* is absence from work without permission or without acceptable reason for more than five working days.

From the records, at the disciplinary hearing, the applicant through her witness one Mohamed Said Kondo (DW1) alleged that, he had not seen the

respondent to his working station since 30th day of August 2018 without any information of his absence. for easy of reference, I wish to quote as follows;

> "Upande wa mleta mashtaka (mwajiri) alileta shahidi mmoja ndugu Mohamed Kondo ambaye ni mkurugenzi wa Furniture Collections Ltd. Shahidi huyo alitoa ushahidi wake wa mdomo pamoja na vielelezo mbalimbali kuhusu shtaka la utoro alithibitisha kwamba yeye ndiye anayeratibu mahudhurio ya wafanyakazi na kwa ushahidi wake wa macho akiwa kazini na kama msimamizi hajamwona bwana Ally S. Papa kazini tangu tarehe 30/08/2018 na ofisi haina taarifa yoyote. Pia ofisi haijui dhamira yoyote yenye kuhalalisha kutokuwepo kwake kazini."

On the other hand, the respondent alleged that, he was absent but for the reason of sickness. Nevertheless, he did not tender any document to substantiate that, he was sick. On hearing in the Commission, the applicant through her witness, DW1 tendered an attendance register proving the absence of the respondent, however the respondent unlike at the disciplinary hearing he denied to have been absent in his working place.

It should be borne in mind that, the termination of an employee's employment machinery starts with the disciplinary hearing, it is at this stage where the fate of the employee's termination is determined and it is where

evidence is adduced to substantiate as to whether the employer has valid reasons to terminate the employees' contract of employment or not.

In the matter at hand, it is clear that the respondent plainly admitted during the disciplinary hearing that he was absent from his working station for reasons of sickness followed by accusations made against him and other applicant's employees. The accusations which required him to regularly report to police and that the employer had fully information of his sickness and criminal accusations. That, being the position, in my considered view, the burden of proof shifts to the employee to prove that he was really sick and was required by police to regularly report or that he was denied an access to his work place. That being the court's observation, I therefore find that, the respondent was terminated on valid reasons notwithstanding the DE2, which is said to be an admission constituting an apology to the disciplinary offence as it is ambiguous as to which the disciplinary offence the respondent was admitting and that when that disciplinary offence was committed.

As to the procedural irregularities, 2nd issue from the outset this court wishes to point out that, the applicant herein did not follow some of proper procedures in terminating the respondent's termination.

First and foremost, unlike the contention by the applicant's counsel that based on the structure of the company there was no appellate board, I am of that holding for an obvious reason that the question of the Company's administration structure is an internal arrangement of the company which cannot defeat the purpose of the law. The right to appeal being a statutory requirement, it therefore follows that, the applicant was required to inform firstly inform the respondent of that right and secondly to compose an appellate body. Thus, the respondent was patently denied a statutory right of appeal.

Secondly, the applicant herein alleges that the respondent was given his right to mitigate. From the records in particular the disciplinary hearing form it is evident that the respondent was not given an opportunity to mitigate after he had been found guilty of the disciplinary offence in the 1st count. According to the wording of rule 13 (7) of the Employment and Labour Relations (Code of Good Practice) G.N. No. 42 of 2007, it is the mandatory requirement of the law that, whenever an employee is found guilty by a disciplinary hearing committee before imposition of any sanction, such employee must be given an opportunity to mitigate.

However, in the matter at hand it is the opposite of what the law requires and the disciplinary hearing form reveals that the respondent was not given an opportunity to mitigate. What is contended by the applicant's counsel to be the mitigation by the respondent does not amount to be mitigation but a liberty to either go back to work or terminate the contract of employment. In that premises, this court is of the view that the same cannot be termed as mitigation as the respondent was only asked by the applicant as to whether he was ready to go back to his working place, and above all this question was asked before the disciplinary committee after had made its findings as to whether the respondent was guilty of the offences charged. In the event, this court finds that the respondent was not given an opportunity to mitigate.

As to the question of investigation, it was the finding of the commission that the applicant did not conduct the investigation to prove the loss he had incurred. Much as the termination letter dated 24th December 2018 reflects on the offence of absenteeism. I am thus justified to find that the applicant was not required to prove anything as far as the loss of the applicant is concerned as opposed to the disciplinary offence of theft or fraud and the like. On equal footing, this court is also of the view that the question on the

seniority of the chairman of the disciplinary hearing is not disputed as the chairman was a senior advocate who was also the secretary of the applicant. From the circumstances of this case. Consequently, I find that the respondent was unfairly terminated in terms of procedural aspect.

Regrading reliefs that the parties are entitled, the arbitral award being like any judicial decision which derives its legitimacy from authority vested in the decision maker who must give reason for the basis. Under provisions of section 40 (1) of the Act, the Commission or labour court when finds a termination to be unfair such authority shall order, reinstatement, re-engagement or compensation of not less twelve (12) months' salary however the authority may award compensation of lesser amount upon giving special and judicious reason (s). Hence, in the circumstances of this dispute namely; that the respondent's absence from work, probably caused loss to the applicant, that, there was reason for termination except violation of some procedures by the applicant. More so, our eyes should also be a reflection to the outbreak of the pandemic disease (Corona-19) followed by economic crisis worldwide, the applicant is therefore entitled to compensation of six (6) months' salary, severance pay and certificate of service.

In basis of the foregoing reasons, this application is granted to the extent that the termination was for valid and fair reason and it is dismissed on the ground that the termination was procedurally unfair. The respondent is entitled to six months' compensation which is less than twelve (12) months on the consideration that there was reason for termination, loss incurred by the applicant due to the respondent's absenteeism from work, he is further entitled to severance pay, one month's salary in lieu of notice, severance and a certificate of service. Each party shall bear her or his own costs of this application and those incurred in the Commission.

It is so ordered.

M. R. GWAE
JUDGE
11/02/2022