IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LABOUR DIVISION)

AT MWANZA

LABOUR REVISION NO. 35 OF 2021

(*Originating from CMA/MZ/NYAM/427/2020/09/2021*)

VRAJALA'S AGENCIES LTD ..... APPLICANT

VERSUS

SELESTINE JOHN..... 1ST RESPONDENT

REVOCATUS NAGABONA ..... 2ND RESPONDENT

DAUD MAGANGA..... 3RD RESPONDENT

FARAJI IDD FARAJI..... 4thRESPONDENT

JUDGMENT

26th August & 26th, October/2022

Kahyoza, J.:

The applicant employed the respondents as security guards on various dates until 16th December, 2020, when she terminated their employment on account of operation requirement. The respondents' services were terminated after the applicant outsourced security services. Aggrieved, the respondents referred a dispute the Commission for Mediation and Arbitration (CMA). The applicant lost. The CMA decided that

the respondents' termination was both substantively and procedurally unfair.

Undaunted, the applicant instituted the current application for Revision praying to this Court to quash the decision of the CMA. The applicant raised four issues for consideration as follows:-

1) whether it was legally acceptable for the commission to accept the testimony of one respondent on behalf of the three others.
2) in the alternative response to (1) above, whether the procedures to accept the testimony of one respondent alone on behalf of others was complied with.
3) in the alternative response to (2) above whether the commission rightly awarded the respondents the terminal benefits despite their testimony that they have received their terminal benefits from the applicant.
4) whether the CMA award is valid and enforceable for the Arbitrator having exercised execution powers in it.

A brief background is that Iddi Faraji, Selestine John, Revocatus Nagabona and Daud Maganga, the respondents were employed as guards on different dates. On 16th December, 2020 the applicant terminated their services because of operation requirement. The applicant outsourced security services. The applicant gave the respondents one day's notice of termination. There was no consultation

done before the applicant terminated the respondents' employment. The record shows that, only Iddi Faraji, one of the respondents, testified. Selestine John, Revocatus Nagabona and Daud Maganga who were also applicants before the CMA, did not testify. The CMA found that the respondents' termination both procedurally and substantively unfair. She also found that Selestine John, Revocatus Nagabona and Daud Maganga, who did not testify were properly represented by Iddi Faraji as the claim was similar.

Aggrieved, the applicant applied for revision. The application for revision raised four issues. The first issue is whether it was legally acceptable for the commission to accept the testimony of one respondent on behalf of the three others. The applicant's advocate submitted that it was violation of rule 25(1) of the **Labour Institutions** (Mediation and Arbitration Guidelines) Rules, G.N. No. 67/2007 to allow Iddi Faraji to testify on behalf of others unless there was a successful application for representative suit.

The respondents submitted in rebuttal of the applicant's argument that, they had the same interest in the matter so the resolved to institute a representative dispute before the CMA by filling a document

to appoint Iddi Faraji to represent them. They added that the procedure for instituting a representative suit in the CMA is specified under rule 5(2) and (3) of the **Labour Institutions** (Mediation and Arbitration) G.N. No. 64/2007. To support their contention, they cited the case of **21st Century Textile (LTD) V. Octaviana Undole & Others** [2013] LCCD No. 30 where it was held that-

> *The procedure instituting a representative suit in the CMA is prescribed under rule 5(2) and (3) of the Labour Institutions (Mediation and Arbitration) Rules G.N 64/2007. That rule states, that where employees have mandated one of them to represent them in processing a dispute at the CMA, such employees must indicate their mandate by signing a document to be filed together with the complaint. In other, it was highly improper for the CMA to permit an employee to institute and or prosecute a dispute on behalf of other employees without proof of authorization.*

The respondents also cited the case of **Security Group (T) LTD V. Samson Yakobo & 10 Others** [2013] LCCD No. 6 where it was held that-

> *In labour disputes, where there are a number of employees with same interest in the matter, any one of them may appear in a representative capacity. Such an employee may appear provided that he is mandated in writing by others, and a signed list of the*

employees sought to be represented is attached to the filed document.

I associate myself with the respondents that a representative suit is governed by rule 5 of the **Labour Institutions** (Mediation and Arbitration) G.N. No. 64/2007 (GN. No. 64/2007). Rule 25 of the **Labour Institutions** (Mediation and Arbitration Guidelines) G.N. No. 67/2007 (GN. No. 67/2007) regulates the mode of presenting evidence before the CMA. Rules 5 of GN. No. 64/2007 states that-

5.-(1) A document shall be signed by the party or any other person entitled under the Act or those rules to represent that party in the proceedings.

(2) Where proceedings are jointly instituted or opposed by one employee, documents may be signed by an employee who is mandated by employee to do so.

(3) Subject to sub(2) a list in writing, of the employees who have mandated, a particular employee to sign on their behalf must be attached to the document. The list must be signed by the employees whose names appear on it.

As states above, rule 25 of GN. No. 67/2007 regulates the mode of presenting evidence. It does not govern representative labour disputes before the CMA. Rule 25(1) stipulates that-

"25.-(1) The parties shall attempt to prove their respective cases through evidence and witnesses shall testify under oath through the following process-...."

I perused the record and found that Selestine John, Revocatus Nagabona and Daud Maganga did sign and file a document on the 23.2.2021 appointing Idd Faraji to represent them. Thus, the representative suit was properly instituted. The issue for determination is whether parties who institute a representative suit are discharged from testifying. In civil cases, it is settled law that a person may act and represent another person, but there is no law or legal enactment, which can permit a person to testify in place of another. This position was pronounced by the Court of Appeal in **National Agricultural and Food Corporation V Mulbadaw Village Council and Others** [1985] TLR 88. The Court of Appeal held that plaintiffs who never testified their cases never got off the ground.

The position in labour disputes is different from the position in **National Agricultural and Food Corporation's** case. The Labour court and the CMA permit representative to give evidence on behalf of employees they represent. It is a settled law that the Labour court or labour division is a court of equity. It is not bound by technicalities. See

rule 3 (1) of the Labour Court Rules, 2007. It is therefore not fatal if an *employee who is mandated by employees to represent them testify on their behave provided they have the similar claims and that employee is able to establish the claims.* This Court in the case of **Security Group (T) LTD V. Samson Yakobo & 10 Others** held that-

> *"Further I wish to stress that in a representative suit, one or more of the claimants, whether or not they are appearing in a representative capacity, can testify on behalf of other claimants and such testimony may be sufficient proof of the whole claim."*

The respondent in this case were employed on various dates as guards. They were terminated on the same day for a similar cause. The same procedure of termination was applied. The applicant gave them a one day's notice of termination. I am of the firm view that, Idd Faraji, their representative was competent to represent them and testify on their behalves. That said, I find no merit in the first ground of revision whether it was legally acceptable for the commission to accept the testimony of one respondent on behalf of the three others.

The applicant seeks this Court to determine in the alternative response to first issue, whether the procedures to accept the testimony of one respondent alone on behalf of others was complied with. It is

unfortunate that the applicant's advocate did not argue in support of this issue. He must have vacated it.

I will not waste time to consider this issue. There is no law proving the procedure of how to accept evidence of a person representing another person. The law regulating the mode of taking evidence does apply. That is the witness must testify under oath or affirmation. Iddi Faraji testified under affirmation. Consequently, I find that the CMA properly received Iddi Faraji' evidence. I find the second issue without merit and dismiss the same.

The applicant prayed this Court to consider whether the commission (CMA) rightly awarded the respondents the terminal benefits despite their testimony that they have received their terminal benefits from the applicant.

The respondents argued that the arbitrator was justified to order the applicant to pay compensation to the respondents after he found that the applicant terminated them unfairly. They referred to section 40 of the Employment and Labour Relations Act, [Cap. 366 R.E. 2019].

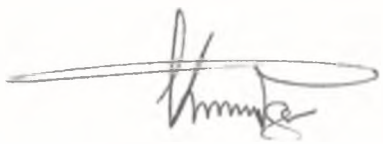
It is true that the CMA found that the applicant terminated the respondent unfairly. It found that the respondents' termination was procedurally and substantively unfair. The respondents had right to be compensated in terms of section 40 of the Employment and Labour Relations Act, [Cap. 366 R.E. 2019]. It is settled that if an employer unfairly terminates his employee, he cannot escape the wrath of section 40 of the Employment and Labour Relations Act, [Cap. 366 R.E. 2019]. The employer can suffer less penalty if termination is found to be only procedurally unfair and suffer heavier penalty when termination is substantively unfair. See the decision of the Court of Appeal in **Felician Rutwaza Vs World Vision Tanzania**, Civil Appeal No. 213 of 2019, where it was held that it is settled law that the substantively unfair termination attracts heavier penalty as opposed to procedural unfairness which attracts lesser penalty.

It follows as day follows night that, since the applicant unfairly terminated the respondents, it was appropriate for the CMA to order the applicant to compensate them. I examined the record and found that the applicant proved to pay the respondents one month's salary in lieu of a notice, 15 days' work pay, 36 days' leave pay and severance pay. The respondents are therefore entitled to 12

months' remuneration as compensation for unfair termination as ordered by the CMA.

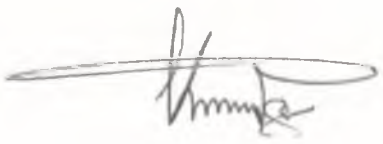
Eventually, I uphold the CMA award to the extent that the applicant unfairly terminated the respondents. However as to the reliefs, I set aside the all reliefs and uphold only the award of compensation for **12 months** under **Section 40 (1) (c) of the Employment and Labour Relations Act, Cap. 366.**

It is ordered accordingly.



J.R. Kahyoza
JUDGE
26/10/2022

Court: Judgment delivered in the virtual presence of Mr. Hamza for respondents and in the absence of the applicant. B/C Jackline present.



J.R. Kahyoza
JUDGE
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