IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LABOUR DIVISION)

AT MBEYA

LABOUR REVISION NO. 6 OF 2022

(Arising from Labour Dispute No. CMA/SNW/MBA/78/2020/AR-38)

BETWEEN

BRAS SERVICE LTD.....APPLICANT

AND

GASTON JOSHUA MWANDETELE.....RESPONDENT

JUDGEMENT

Date of last Order: 11.11.2022
Date of Judgment: 15.12.2022

Ebrahim, J.

The applicant BRAS SERVICE LTD being aggrieved with the award of the Commission for Mediation and Arbitration at Mbeya in Labour Dispute No. CMA/SNW/MBA/78/2020/AR.38 dated 28.03.2022, filed the instant application seeking for this court to revise and set aside of the award. The application was preferred under **Rule 24 (1), (2) (a) – (e), (3) (a) – (d) and 28 (1) (c), (d) and (e) of the Labour Courts Rules, 2007 (GN No. 106 of 2007)** read together with sections **91 (1) (a) and 94 (1) (b) (i) of the Employment and Labour Relations Act No. 6 of 2004 (ELRA).** The application was supported by an affidavit

sworn by Rene Banza Kuswa, principal officer of the Applicant. The application was protested through a counter affidavit sworn by Mr. Benedict Sahwi, learned advocate for the Respondent.

The brief facts leading to the present application is that, the Applicant was the employer of the Respondent, GASTON JOSHUA MWANDETELE from 13.02.2018 on the permanent and pensionable basis. The Respondent was employed in the position of Cargo Escort. He was escorting cargo trucks from Tunduma-Songwe Region to Dar es Salaam. The Respondent was terminated from the employment on 30.04.2020 for gross insubordination and gross negligence resulting to the loss of property. Dissatisfied with termination, the Respondent instituted a labour dispute to the Commission for Mediation and Arbitration (CMA) claiming to be unfairly terminated. The claim was protested by the Applicant maintaining that the termination was fair both, substantively and procedurally. The CMA heard the matter on merits. At the end it pronounced the award in favour of the Respondent. The CMA decided that the termination was unfair both, substantively and procedurally. It thus, ordered the Applicant to pay the Respondent a sum of Tshs. 4,350,000/= as twelve months compensation. Being dissatisfied, the Applicant preferred the instant application raising the following issues:

1. *Whether it was proper for the arbitrator to hold that there were no fair reasons to justify termination of the contract of the Respondent.*
2. *Whether it was proper for the arbitrator to exonerate the Respondent from responsibility for the misconducts after he had admitted being involved by not escorting the vehicle and not comply with the orders of the employer maliciously.*
3. *Whether it was proper for the Arbitrator to hold that there was no duty of care by the Respondent/employee while he had such duty.*
4. *Whether it was lawful and proper for the Arbitrator to hold that the procedure for termination was not followed while fair hearing was conducted.*
5. *Whether it was proper for the Arbitrator to hold that the Respondent was not summoned to attend the disciplinary hearing.*
6. *Whether it was proper for the Arbitrator to hold that the Respondent was entitled to compensation while he was not.*

The application was disposed of by way of written submissions. The Applicant was represented by advocate Eneza Msuya while the respondent had service of advocate Benedict Sahwi.

Supporting the application, advocate Msuya submitted regarding the 1st issue that it was improper for the Arbitrator to hold that there was no fair reason to justify termination of the contract of the Respondent. According to him the Applicant had genuine reasons for termination being that the Respondent caused loss to the Applicant as he omitted to fulfil his job description. Advocate Msuya argued that the reason by the Respondent that he was not paid travelling allowance was not good reason to escape from his responsibility. He argued further that claim of payment of travelling allowance was unjustifiable cause of risking the cargo.

As to the 2nd and 3rd issue, advocate Msuya submitted that the Arbitrator erred when held that the respondent had no duty of care to the Applicant's cargo. Explaining to this court the meaning of escort as defined in different books which means making certain that it leaves or arrives safely, also that it means travel with someone in order to protect or guard them, advocate Msuya argued therefore, that the Respondent being employed as escort had a duty to protect the merchandise in the truck and was liable for any loss.

Regarding the 4th and 5th issues advocate Msuya argued that the Applicant adhered to **Rule 13 of the Employment and Labour**

Relations (Code of Good Practice) Rules G.N No. 42 of 2007. That the Respondent was summoned through different letters tendered in the CMA such as Exhibit R1, R2, R3 and R4. He added that even when the Respondent appealed to have no bus fare the Applicant sent the sum. He gave an example of Tshs 40,000/= that was sent to the Respondent, however, he did not enter appearance. Advocate Msuya also contended that when the Respondent deliberately failed to appear, the hearing proceeded *ex-parte* under **Rule 13(6) of GN. 42/2007.** To substantiate his contention, he referred this court to Exhibit R6 i.e the report from the committee on *ex-parte* hearing.

Submitting for the 6th issue, advocate Msuya averred that the Respondent was not entitled to any compensation and doing so is as good as benefiting from his own wrong. He further stated that it is a cardinal law that a man should not benefit from his own wrong. To substantiate his argument, he cited the case of **Magige Ghati Kisabo vs Mseti Mang'are** Misc. Land Application No.171 of 2019 where it was held that court will not aid man to drive from his own wrong.

In reply, advocate Sahwi supported the decision of the CMA. He submitted that the Arbitrator was justified in deciding that the Applicant unfairly terminated employment of the Respondent. According to

advocate Sahwi, the Arbitrator found substantively unfair termination since the Applicant did not prove the allegation /offences of gross insubordination and gross negligence which the Respondent was charged with. He proceeded arguing that the Applicant could not blame the Respondent for not fulfilling his duty while the Applicant defaulted to pay transportation allowance.

As to the procedures, advocate Sahwi argued that **section 39 of ELRA** imposes the duty to the employer (the Applicant) to prove that termination was fair. He argued also that **Rule 9(3) of G.N No. 42 of 2007** requires the employer to prove fairness of the reason for termination on balance of probabilities which the Applicant failed to prove. According to him the Applicant did not observe the requirement of **Rule 13(1) of G.N No. 42 of 2007** as she did not conduct investigation which would have justified the applicant to conduct disciplinary hearing. Advocate Sahwi contended that the act of the Applicant of failure to conduct disciplinary hearing committed a serious irregularity which vitiates proceedings since the respondent was denied his right to be heard. According to him exhibit R6 (a report of disciplinary hearing) was cooked due to the reason that the Applicant did not tender any recorded minutes of the hearing. Advocate Sahwi

concluded by urging the court to award the reliefs to the Respondent as prayed in the CMA Form No. 1.

In his rejoinder submission, counsel for the Applicant insisted that the Applicant had fair reason for termination since the respondent himself admitted to abscond from escorting the truck. He contended also that counsel for the Respondent acted unprofessionally in pressing the allegation that the Applicant cooked exhibit R6. Advocate Msuya insisted further that in any company administration delaying of payment is unescapable phenomena hence the Respondent committed gross misconduct by not escorting the truck. Concluding, counsel for the Applicant stated that the application has merit since the Applicant followed both substantive and procedural law in terminating the Respondent's employment.

Having gone through the submissions by the counsels for the parties and the record from the CMA, the controverse for determination is based on two main issues; whether termination was fair, both substantively and procedural; and what remedies parties are entitled to (if any).

Section 37 of ELRA provides that:

"Section 37 (2) A termination of employment by an employer is unfair if the employer fails to prove-

(a) That the reasons for ***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." [Emphasis is mine].

The above provision is also under **Rule 9(4) of G.N. No. 42/2007**

The burden of proof of fairness of termination lies on the Employer. This is as per **Section 39 of the ELRA** and **Rule 9(3) of G.N. No. 42/2007**. Section 39 for example, reads:

"In any proceedings concerning unfair termination of an employee by an employer, the employer shall prove that the termination is fair."

In the matter under consideration, according to the letter terminating the employment contract, reasons for termination were gross insubordination and gross negligence. These two offences fall under "Misconduct" which is provided under **Rule 11 to 13 of G.N No. 42 /2007**. Specifically, Rule 12 provides that:

" Rule 12 (1) Any employer, arbitrator or judge who is require to decide as to termination for misconduct is unfair shall consider;

(a) Whether or not the employee contravened a rule or standard regulating conduct relating to employment.

(b) If the rule or standard contravened, whether or not;

(i) It is reasonable.

(ii) It is clear and unambiguous.

iii) The employee was aware of it.

(v) Termination is appropriate sanction for contravening the rule.

(2) First offence of an employee shall not justify termination unless it is proved that the termination is so serious that it makes a continued employment relationship intolerable.

3) The acts which may justify termination are-

(a)N/A

(b).....

(c).....

*(d)**gross negligence***

*(f) **gross insubordination***

(4) In determining whether or not termination is the appropriate sanction, the employer should consider;

a) the seriousness of the misconduct.....

b) the circumstance of the employee's such as employment record, length of service, previous disciplinary record....." [Emphasis is mine].

In the matter at hand the evidence adduced by the Applicant/employer regarding reasons for termination was that the Respondent refused to escort the cargo truck as the result some i.e about 80 kilograms of copper got lost. The Applicant's witness testified that the cargo (copper) which was under her control and was supposed to be escorted by the Respondent was lost due to the refusal of the Respondent to fulfil his responsibility.

In turn the Respondent denied the claim of loss he only admitted to have not escorted the truck on the reason that he was not paid travelling allowance. The Respondent further gave an explanation on how they account for the loss and report the same when it happens. He also testified that they report theft incidence to police and be availed with police loss report. However, in the instant matter the Applicant did not produce any document to justify the loss.

This court is of the view that since the Respondent was employed on the position of escort; and since he was paid monthly salary for that position; and owing to the fact there was no any explanation that the

two (the Applicant and Respondent) had an agreement that in absence of travelling allowance he should not fulfill his duty of escorting the cargo; the act of refusing to escort the truck was insubordination. Notwithstanding the fact that the Applicant did not prove loss resulted for that misconduct of the Respondent, it is my conviction that the same does not exonerate the Respondent from the offence of insubordination.

I am abreast of the report of the disciplinary committee which convicted the Respondent for the offence of refusing the directions of his supervisor to introduce and sign the attendance book. However, going through oral evidence that was adduced by the Applicant's witness it is apparent that the Applicant's main reason for terminating the Respondent's employment was the Respondent's refusal to escort the truck. In fact, escort was the major responsibility of the Respondent of which failure to fulfill went to the root of his employment.

In the circumstance, the reason of gross negligent was not important to be proved since gross insubordination in itself was a valid reason to terminate the Respondent's employment. Therefore, there was a valid reason for termination as per **Rule 12(3) (f) of Employment and Labour Relations (Code of Good Practice) Rules GN 42 of 2007**.

This is also due to the reason that the law does not require prove of all offences the employee is charged with.

Now, the second limb to the first issue is whether procedures for termination were followed. Fair procedures for termination are outlined under **Rule 13 of G.N. No. 42/2007** which amongst others requires:

(i) *The investigation to be carried out.*

(ii) *Employee to be given a reasonable time to prepare for the hearing.*

(iii) *Right of representation by either Trade Union or by fellow employee of own choice.*

(iv) *Hearing to be conducted and finalized within a reasonable time and;*

(v) *Hearing to be chaired by a sufficiently senior management representative who shall not have been involved in the circumstances giving rise to the case.*

(vi) *In case the disciplinary hearing committee finds employee guilty of misconduct employee shall give his mitigation factor, and employer may make its decision and reasons for its decisions thereto, including explaining right of appeal to an employee.*

In the matter at hand, the CMA decided that the procedures were not followed as the Respondent's final letter requiring him to attend was issued under a short notice that is two days before the hearing. It also

decided that since there was allegation that the hearing was *ex-parte* conducted, the Applicant failed to prove the same.

Conversely, the available evidence both oral and documentary, the Respondent firstly attended the hearing meeting however, did not say anything as he requested to do so in the presence of his advocate. The Applicant postponed the hearing and scheduled it on another date. Thereafter, the Respondent was summoned thrice in vain. This is exhibited by Exhibit R1, R2, R3, and R4 which were not objected when tendered before the CMA. In the circumstance, I find that there is ample evidence leaving no doubt that the respondent denied himself the right to be heard.

The law however, requires the employer to conduct *ex-parte* hearing in case an employee does not appear after being duly served. See **Rule 13(6) of G.N. No. 42 of 2007**. This means that the employer still has the duty to tender evidence to prove the allegations against the employee as if the employee was present.

The Applicant in the instant matter claims that she conducted *ex-parte* disciplinary hearing. The controversy nonetheless, is whether the Applicant proved before the CMA that *ex-parte* hearing was really conducted. Counsel for the Applicant is relying on exhibit R6 i.e., the

Report of the disciplinary committee to maintain that the hearing was conducted. In turn, counsel for the Respondent is claiming that disciplinary committee report is not proof evidence that disciplinary hearing was conducted.

Basically, the law does not provide the manner under which the conduct of disciplinary hearing can be proved before the court. It only provides that there shall be fair hearing. There is no dispute in the matter at hand that no minutes of the meeting nor proceedings were tendered. However, there is only a report of disciplinary committee. The minor question is whether the report can prove the conduct of the meeting. In my view, the answer depends on the circumstance and the fact of each case. I this case, the report i.e exhibit R6 is detailed of what took place since the Respondent was charged until the conduction of ex-parte hearing. It also detailed the evidence that was adduced by the Applicant to prove the misconduct of the Respondent. Looking at the fours of that report I feel compelled to hold that the same was enough proof that the Applicant conducted *ex-parte* disciplinary hearing the result of which the Respondent was found guilty of the offence charged with. On the aspect, I fault the decision of the CMA which said that the Applicant abducted fair procedure in terminating the Respondent's employment.

The next issue is what remedies are parties entitled. In the preceding issue I have found that the Respondent was fairly terminated both, substantively and procedurally. It is again on the record that the Respondent was paid all of his terminal benefits. There is thus, no any relief the Applicant owes to the Respondent.

That being the case, the application is granted. The CMA award dated 28th March, 2022 is hereby revised and set aside. Being a labour matter, I make no order as to costs.

Ordered accordingly.

R.A. Ebrahim

JUDGE

Mbeya

15.12.2023