

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT ARUSHA

LABOUR REVISION NO. 66 OF 2021

*(Originating from Commission for mediation and Arbitration- Employment Dispute No
CMA/ARS/286/2020)*

MODERN DRIVING SCHOOL LIMITED APPLICANT

VERSUS

GODIUS ELIA MTENGA RESPONDENT

JUDGMENT

10/03/2022 & 28/04/2022

KAMUZORA, J.

The Applicant Modern Driving School Limited was the Respondent at the Commission for Mediation and Arbitration (CMA). The decision of the CMA was in favour of the Respondent and Applicant being aggrieved by such decision preferred this revision under sections 91(l),(a)(2)(a),(b) and (c), and section 94(1) (b) (i) of the Employment and Labour Relations Act No. 6 of 2004, Rule 24(1) &(2) (a) (b) (c) (d) (e) (f)and (3) (a) (b) (c)(d) and Rule 28(1) (a) (b)(c) (d) & (e) and Rule 28 (2) of

the Labour Court Rules G.N No. 106 of 2007. The Applicant prays for this Court to be pleased to call for the records and revise the decision in CMA/ARS/286/2020.

The facts of the dispute between the parties as indicated in the CMA records as well as this application are such that, the Respondent was employed with the Applicant as a chief instructor in the year 2005 and worked with the Applicant for over 15 years. That, due to the outbreak of the Covid-19, sometimes in March 2020 the Applicants' business was closed on the government order and when they were allowed to resume activities the business was not well and the school management decided to grant its employees including the Respondent unpaid leave for a period of three months from 26/05/2020 but were paid the salary for the month of May 2020.

That on 26/06/2020 the Respondent filed a complaint at the CMA claiming for unfair termination, termination letter as well as certificate of good service. The CMA issued its decision to the effect that there was no termination of employment of the Respondent by the Applicant and the Respondent claims at the CMA was premature. The CMA also held as the Applicant did not take any action of the Respondent's misconducted of failure to report back to work after the lapse on unpaid leave it

amounted to procedural irregularity. The CMA then decided to award the Respondent for unpaid salaries for months March, April and May to the tune of Tsh 1,560,000/-, unpaid annual leave to the tune of Tshs 520,000/=, severance pay to the tune of Tshs 62,400/-, gratuity to the tune of Tshs 873,600/= together with the certificate of service. Aggrieved by the CMA award the Applicant preferred this revision application on the following grounds: -

- 1) That, the Honourable Commission erred in law and in fact for holding that the Respondent contract was not terminated by the Applicant and at the same time to hold that the Respondent was unfairly terminated by the Applicant.*
- 2) That, the Honourable Commission erred in law and in fact for holding that the Applicant was supposed to conduct a disciplinary hearing and ignoring the fact that at the time the Respondent referred dispute to the Commission he was still on a leave.*
- 3) That, the Honourable Commission erred in law and in fact for holding that the Applicant was supposed to conduct a disciplinary hearing and ignoring the fact that the issue of absenteeism was not framed as an issue to be addressed by the parties during hearing.*
- 4) That, the honourable Commission erred in law and in fact by failing to properly evaluate the evidence on record showing that the Respondent was not terminated by the Applicant.*

When the application came up for hearing, the Applicant was represented by Mr. Benson Hamis Mhango learned counsel while the Respondent enjoyed the service of Ms. Fredrica Sikale a secretary from TUICO. Hearing of the application was by way of oral submissions.

Arguing in support of the application, Mr. Mhango started by adopting the contents of the affidavit in support of application. On the first ground he submitted that, at page 4 paragraph 2 of the award, the Arbitrator concluded that the Respondent here in who was the complainant was not terminated from his employment by the Applicant but rather he absconded and left himself. That, in the same paragraph a different ruling was delivered on the same subject matter where the Arbitrator held that the Applicant herein was supposed to conduct hearing to afford the Respondent a right to heard.

He went on and submitted that, the Arbitrator held that in the circumstance of unfair termination for the fixed term contract the award of compensation of the remaining period is appropriate and that Respondent employment was unfairly terminated by the Applicant and went on to grant him salary arrears and terminal benefit. The counsel for the Applicant was of the view that, the Arbitrator contradicted

himself by delivering an award which contains two different outcomes in one subject matter.

On the second ground Mr. Mhango submitted that, the Arbitrator at page 5 paragraph 3 held that the Respondent was to be afforded with right to be heard on absenteeism while the issue of absenteeism aroused when the dispute was already referred to the CMA and it was on the stage of the hearing to the dispute. He argued that, it was wrong for the arbitrator to deliver an award on something that was not framed as an issue and the Applicant was not given a chance to responded on issue of absenteeism before the CMA. That, it is the Applicant herein who was not afforded the right to be heard on the issue of absenteeism.

Submitting for the third ground he argued that, in delivering award, the CMA was supposed to focus only on issues which were framed which are: -

- 1. Whether there was a termination by the Applicant herein*
- 2. If the first issue is answered in affirmative, whether the termination was fair*
- 3. To what reliefs are parties entitled to.*

He insisted that, the issue of absenteeism was not framed as it arose in the course of hearing. That, it was not disputed that at the time

the CMA case was on going is at the time when the Respondent's leave lapsed and he was supposed to report back to work while hearing was still going on. Therefore, that, it was wrong for the Arbitrator to hold that the Applicant was supposed to conduct hearing while the leave lapsed during the hearing of the same case.

On the fourth ground, the counsel for the Applicant claimed that there was no proper evaluation of evidence on record. He was of the view that, had the arbitrator properly evaluated the evidence, he would have noted the following; First, that there is leave letter received by the Respondent which instructed him to go for three months leave. Second, that the letter sent to the Applicant by the Respondent requesting to know the status of the Respondent's employment. That, if the arbitrator would have evaluated the two letters, he would found that there was no termination at all and he would not have raised the issue of absenteeism.

The Applicant concluded by reiterating that, the issue of closing down institution and schools in 2020 due to Covid- 19 break out is a matter of public notice and would like the court to take judicial notice on that. That, upon closure of institutions, the Respondent was given a letter and requested to go on three months unpaid leave and he was supposed to

report back to work upon lapse of three months which was 26th August 2020. That, before the lapse of his leave, he filed a dispute to CMA for unfair termination while he was supposed to wait for his leave lapse and report back to work. The counsel maintained that, the award by the arbitrator is tainted with contradiction for holding that the Respondent was not terminated by the Applicant and still hold in the same award that the termination was unfair. He thus prays that the CMA award be quashed and this court grant all prayers in the chamber summons.

In contesting the application Ms. Federica, the Respondent representative also adopted the counter affidavit and submitted that, this application should be struck out with costs for abuse of court process. That, the CMA award was properly delivered by the arbitrator. That the Respondent was claiming for unfair termination and according to MCA form No. 1, the Respondent herein indicated that there was verbal termination of his employment. Ms. Federica explained that, the hearing at CMA was conducted in the presence of both parties thus faulted the Applicant submission that the Applicant was not accorded the chance to be heard especially on the issue of absenteeism. She insisted that, both parties at CMA were given right to be heard and the hearing was fair.

Ms. Federica further submitted that, before the Respondent filed the dispute at CMA, he was given a leave notice by his employer that he was to go on leave as it was announced by the government that all institutions were to be closed because of the issue of COVID 19. She however claimed that the government did not ask the institutions not to pay the employees' salaries. That, after the lapse of one month notice of leave, the Respondent was given another three months' notice of leave that was supposed to end on 26th August 2020. That, the Respondent wanted to know his employment status because he was in a very hard condition and did not know why he was not paid salaries but he received verbal response from his employer that he was terminated. That, this is reason in CMA form 1 the Respondent requested to be issued with termination letter because. Ms. Federica further submitted that, after the verbal termination, the Respondent filed a dispute before the CMA for unfair termination. She asked this court to take note that employment can be termination in writing or verbally. She insisted that, the arbitrator issued the award in considering that the Respondent was working under a fixed contract of two years and he has worked for 14 years. That the arbitrator was correct to state that where there is a breach of contract by the employer the employee is entitled to be paid the remaining

period of the contract. She pointed out that the CMA award did not mention any terminal benefit to be paid to the Respondent but was to be paid his salary arrears which is the right of the Respondent for the month of March, April and May 2020 and the leave allowance.

Ms. Federica also submitted that the arbitrator at page 6 of the award stated that the Respondent was supposed to be paid 15% of his monthly salary times 14 years he worked with his employer. That this was according to the employment contract of the Respondent. As the contract indicated that the Respondent was to be paid 15% of his salary after the lapse of every two years contract.

On the submission by the counsel for the Applicant that the arbitrator erred in law for holding that the Applicant was supposed to conduct the hearing even if the Respondent was not there Ms. Federica submitted that, there was violation of procedure which denied the Respondent the right to be heard. She insisted that the CMA evaluated all the evidence and the award is fair. To conclude, the Respondent prays for this Court to order for the Respondent to be paid according to the CMA award.

In a rejoinder submission Mr. Mhango prayed that the uncontested grounds by the Respondent be taken as admitted such that there was

no termination and at the same time holding that the termination was unfair. With regard to the payment of Respondent's salary the counsel for the Applicant invited this court to regard exhibit MD1 as proof that the Respondent was paid. With regard to the issue of verbal termination he submitted that, the said issue is not found anywhere in the award and he prayed for this court to rule in favour of the Applicant.

I have considered the records for the CMA, the application and submissions by the Applicant's counsel and Respondent's representative. In determining whether the CMA was right to hold that the Respondent contract was not terminated by the Applicant and at the same time to hold that the Respondent was unfairly terminated from his employment this court will also review the records to see if there was an issue of misconduct by the Respondent and failure to hold a disciplinary hearing by the Applicant.

From the analysis of the records and the submissions, there is no dispute that the Respondent was an employee of the Applicant in a position of a Chief Instructor as evidenced by exhibit P1. Also reading from the records and submission by parties as well as the CMA award there is no dispute that the Respondent was not terminated from his employment by the Applicant.

What is disputed in this matter is whether the arbitrator was correct to hold that there was an issue of absenteeism by the Respondent which amounted to a misconduct and that the failure by the Applicant to hold a disciplinary hearing amounted to unfair termination in terms of procedural aspect.

The record shows that the Respondent at the CMA in CMA F1 claimed to have been orally terminated from his employment on 02/06/2020 without being given the reason for termination. On their defence the Applicant at the CMA claimed that the Respondent was not terminated from his employment but rather he was issued with a notice of 3 months leave pursuant to exhibit exhibits D1 and D2 and before the expiration of the leave period the Respondent instituted a complaint at the CMA for unfair termination.

The Respondent however at the CMA did not dispute that he was given unpaid leave as he also tendered exhibit P2 concerning the same leave which commenced on 26/05/2020. It is also in record that the complaint at the CMA was filed on 02/06/2020 the time when the Respondent was still on his leave.

For the reasons above and with view of the CMA award I agree that the Respondent was not terminated from his employment as even

the time when he claimed he was orally terminated from his employment he was supposed to be on leave. Also, as the Applicant denied terminating the Respondent then the Respondent was by law duty to prove that he was orally terminated from his employment but again he did not do so hence no termination of employment was proved.

On the ground that the Arbitrator erred by holding that the Applicant was supposed to conduct a disciplinary hearing. It is in my knowledge that, the law under the Employment and Labour Relations (Code of Good Practice) GN 42/2007 mentions what may constitute serious misconduct leading to termination of an employee and absence from work without permission or without acceptable reason for more than five working days is one among the misconduct.

The CMA records reveals that the arbitrator was of the view that upon the expiration of the leave circle and upon the Respondent not reporting back to work and the failure of the Applicant to conduct a disciplinary hearing, the Applicant was in contravention of the procedure for termination. I am much aware of the requirement of the law that the disciplinary hearing have to be conducted for an employment misconduct even without the employee being present, but the facts of this case are different for me to hold the same.

Under the current revision application, the leave period lapsed while the matter was at the adjudication stage before the CMA. I find that there existed in this case a good ground for not conducting the disciplinary hearing as there was a pending issue to be determined by the competent authority before the Applicant could proceed with other procedures. I therefore find this ground to have merit. The CMA erred in the Respondent was not terminated but at the same time to hold that the Applicant was supposed to conduct a disciplinary hearing and ignoring the fact that at the time the Respondent referred dispute to the Commission he was still on leave.

On the issue on evaluation of evidence, it is records that the CMA agreed that the Respondent was not terminated but proceeded on awarding the Respondent. It was contended by the Respondent's representative that, it is the requirement of the law that where there is unfair termination of employment, the employee is to be paid all his entitlements associated with termination. The Respondent claimed before the CMA for payment of notice, unpaid leave, gratuity, salary arrears severance pays termination letter just to mention a few. The CMA awarded the Respondents compensation for the remaining period of the contract.

While I agree with the CMA that the Respondent was not terminated from his employment, I do not agree with the CMA conclusion that the Respondent is to be paid compensation for the remaining tenure of the contract because no proof that the Applicant breached the employment contract or that there was termination of the Respondent's employment. In this matter the Respondent on his own peril filed a premature complaint before the CMA. Had the CMA considered each piece of evidence before it, it could have realised that no award could be issued as there was no termination of employment contract by the Applicant.

In the result, I find this application to have merit and it is hereby allowed. The proceedings of the CMA, Arbitrator's award and orders resulting therefrom are hereby quashed and set aside. In considering that this is a labour dispute, no order for costs is made.

DATED at **ARUSHA** this 28th Day of April 2022



A handwritten signature in blue ink, appearing to read "D.C. Kamuzora", is written over the seal.

D.C. KAMUZORA

JUDGE