IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT ARUSHA

LABOUR REVISION NO. 72 OF 2021

(Originating from Labour dispute No CMA/ARS/ARS/22/2020)

GEORGE MAMBO ..... APPLICANT

VERSUS

SENSE OF AFRICA TANZANIA LTD (SOA) .....RESPONDENT

JUDGMENT

02/12/2021 & 03/03/2022

KAMUZORA, J:

In the Commission for Mediation and Arbitration of Arusha (CMA), George Mambo (the applicant herein) filed labour dispute vide CMA/ARS/ARS/22/2020 against his employer Sense of Africa Tanzania Ltd (SOA) (the respondent herein) claiming that he was unfairly terminated from employment. Having considered the evidence from the parties and exhibits tendered before it, the CMA in its award dated 16th July, 2021 made a decision that, there was no any termination of employment of the applicant rather it was the applicant who did

abscond from his employment and then filed his complaint at the CMA before a disciplinary hearing could be conducted against him. The CMA thus dismissed the complaint made before it by the applicant for being meritless. Being dissatisfied with the CMA award the applicant preferred the present revision application on the following reasons/grounds: -

1. *That, the Honourable Arbitrator erred in law and facts by failure to record and analyse properly the evidence which were before him and jump into the wrong conclusion contrary to the evidence adduced by parties to the Labour dispute.*
2. *That, the Honourable Arbitrator erred in law and facts by holding that the termination was fair while the respondent failed to prove the same.*
3. *That, the Honourable Arbitrator erred in law by not considering that the disciplinary hearing was to be conducted even with absence of the respondent.*
4. *That, the Honourable Arbitrator erred in law and fact by stating that the Applicant absconded before the date of disciplinary hearing while the respondent failed to confirm the service of the disciplinary hearing invitation letter.*
5. *That the award does not reflect the proceedings of the case.*

Before delving into what was argued by the parties in respect of the revision, it is imperative to demonstrate the facts leading to this application as may be glanced from the record, albeit briefly.

The applicant was employed by the respondent as a transport officer since 1st day of January 2017 and was receiving a monthly salary of Tshs 1, 490,562.40/=. The applicant claims to have been orally terminated from his employment on the 31st day of December 2019 after a claim of loss by the respondent. It was alleged that the applicant was summoned to a disciplinary hearing and summons was tendered as Exhibit D2, but the applicant refused to attend the hearing. That, he was again issued with another summons Exhibit D3 but instead of attending the hearing the applicant filed a complaint at the CMA.

The CMA made a conclusion that the applicant was not terminated from his employment, but he absconded himself from work hence the claim for unfair termination of employment was without merit and was dismissed by the CMA. Being dissatisfied by the CMA award the applicant preferred this current application. The application was supported by an affidavit sworn by Ms. Anna Mnzava the applicant's representative and was strongly opposed by a counter affidavit sworn by Mr. Nassir Juma Swedi the country Manager of the respondent.

Hearing of the application was by way of written submission whereas the applicant was represented by Ms. Anna Mnzava, learned advocate while the respondent enjoyed the service of Mr. Erick

Stanslaus, learned advocate. Partis filed their respective submissions as scheduled.

The major issue calling for the determination of this court is whether the CMA was right to hold that the applicant was not terminated from his employment.

Arguing in support of the application Ms. Anna submitted for the first ground of revision that, the trial Arbitrator failed to properly analyse and record the evidence before him. He stated that the applicant was orally told by the country manager to handle over everything and leave the office and he was not allowed to be seen around the respondent's premises. That, he was never told the reason for termination but rather required to attend the disciplinary hearing. Ms. Anna claimed that the Arbitrator failed to record the evidence as the witness of the respondent stated that the applicant was supposed to attend a disciplinary hearing but the same was not conducted. She referred Rule 8 of The Employment and labour Relations (Code of Good Practise) Rules G.N No 42 of 2007 and stated that the employer ought to have conducted an investigation and satisfy himself before a disciplinary hearing would be conducted against the employee. That, by the evidence of DW1 the

respondent violated rule 13(1) of the Employment and Labour Relations Act (Code of Good Practice) GN 42 of 2007.

Submitting for the second ground of revision Ms. Anna argued that the respondent was duty bound to proceed with the disciplinary hearing even in the absence of the applicant in accordance to Rule 13(6) of The Employment and labour Relations (Code of Good Practise) Rules G.N No 42 of 2007. To support her submission, she cited the case of **Precious Air Service vs. Salvatory Kundly,** Revision No. 111 of 2008.

Submitting for the third ground of revision Ms. Anna submitted that, as per exhibit P2 and D2, the first date for disciplinary hearing was on 19/12/2019. That, the applicant attended but he was informed that there is no one to conduct that meeting and on 30th December, the applicant was orally terminated by the respondent.

Regarding letter for invitation to disciplinary hearing (exhibit D3) the counsel submitted that, the respondent failed to give proof, but the CMA went on and admitted the same. That, the respondent never conducted the disciplinary hearing. That evidence was clear that the applicant did not abscond from work and never received any notice from 30th December 2019.

Ms. Anna submitted for the fourth reason that the award does not reflect the proceedings. She explained that the respondent's witness testifies that he did nothing as far as the procedure for termination is concerned. That, he decided not to conduct a disciplinary hearing in the absence of the applicant thus the applicant was not given his right to be heard. To cement her submission, she cited the case of **Jimson Security Service v Joseph Mdegela,** Civil Appeal No 152/2019, the case of **Sevro Mutegeki and Rehema Mwasandube V Mamlaka ya Maji Safi na Usafi wa Mazingira Mjini Dodoma (DAWASA),** Civil Appeal No. 343/2019, and section 37 (2) of the Employment and Labour Relations Act Cap. 300 of 2019.

Responding to the first ground Mr. Erick submitted that there was no evidence submitted by the respondent proving that he was informed that the disciplinary hearing will not be conducted. Regarding the issue of investigation, he submitted that it was not possible for the respondent to know whether investigation was conducted as he decided not to attend to the disciplinary hearing and thus the respondent wanted to ensure that the procedure was followed that is why it issued two notices for the attendance at the disciplinary hearing.

With regard to the second ground, Mr. Erick submitted that, the applicant prematurely filled the matter at the CMA before the same would first be determine internally. To support this the case of **Fey Stambuli V Rudys Hotel,** Labour Revision No 570 of 2016 was cited by the counsel for the respondent.

Regarding the issue of conducting disciplinary hearing, he submitted that, the applicant was issued the first invitation to attend disciplinary hearing and failed to attend without any reason. That, the respondent issued another invitation starting that the hearing was to be conducted on 14th day of January 2020 but on 09th day of January 2020, the respondent received a copy of CMA form number 1 from the applicant. The counsel was of the view that, it was pointless for the respondent to conduct a disciplinary hearing on 14th day of January against the applicant since he already filed a dispute claiming for unfair termination.

Regarding the applicant's submission based on the provision of Rule 13(6) of the Employment and Labour Relations (Code of Good Practise) Rules G.N No 42 of 2007, the counsel for the respondent submitted the law does not impose a mandatory requirement to proceed with a disciplinary hearing in the absence of the employee. That, the law

uses the word 'may' and not 'shall' meaning that it does not impose a mandatory requirement to conduct disciplinary hearing in the absence of the employee.

Submitting on the third ground Mr. Eric argued that even the invitation letter attached by the applicant to attend to the disciplinary hearing was not signed by the applicant. That, the respondent did not conduct disciplinary hearing on the ground that he was already served with the CMA form number 1 from the applicant meaning that the dispute was already filed before CMA for a claim of unfair termination.

With regard to the fourth ground, that the award does not reflect the proceedings the counsel for the respondent submitted that, the applicant failed to show how and where the award does not reflect the proceedings. He concluded that, by issuing a notice to attend disciplinary hearing, the respondent intended to afford the applicant with the right to be heard but the applicant denied his right. He thus prayed that the application for revision be dismissed.

In a brief rejoinder by Ms. Anna reiterated what was submitted in chief that, the arbitrator failed to make an evaluation of evidence. She cited the case of **Jeremy Woods & Another v Robert Chandra & others** [2008] 1EA 143, **Abdulkarim Haji v. Rymond Nchimbi Alois**

& another [2006] TLR 419. That, according to the evidence laid down at the CMA the respondent failed to prove that an investigation was conducted to enable a disciplinary hearing to be conducted against the applicant. To buttress that point she cited the case of **Adam Lengai Masangwa and another v. Mount Meru,** Labour Revision No 01 of 2018 HC Arusha (Unreported) and the case of **Fredrick Mizambwa v Tanzania Authority**, Revision No. 220/2013.

I have considered the records for the CMA, the application and submissions by the counsel for the parties. In determining whether the CMA was right to hold that the applicant was not terminated from his employment, this court will also review the records to see if there was failure to record and analyse the evidence before coming to that conclusion.

From the analysis of the records and the submissions, there is no dispute that the applicant was an employee of the respondent in a position of a Transport Manager as evidenced by exhibit D1. What is disputed in this matter is whether the applicant was terminated from employment. While the respondent claims that there was no termination of the employment contract, the applicant claimed that he was terminated by the respondent.

The records show that in the CMA F1, the applicant claimed to be terminated on 31st December 2019 without reason for termination and without being given right to be heard. On their defence, the respondent claimed that the applicant was not terminated but he was issued with notice to attend disciplinary hearing but failed to attend. The alleged notice was issued on 06/11/2019 for the applicant to appear for disciplinary hearing on 19/12/2019 at 11:00 hours and the applicant in his evidence before the CMA admitted receiving the notice. He went for the meeting but was informed that people responsible to conduct the meeting were not there and thus was asked to continue working. He claimed that on 31/12/2019, the country manager asked him to handover all the office properties as he has disciplinary issue regarding the fuel stealing and he was told not to be seen at the place of work. It was however claimed that the applicant was again issued another notice on 31/12/2019 to appear for disciplinary hearing on 14/1/2020 (exhibit D3) but before that date he lodged a dispute before the CMA that was admitted on 10/01/2020 as per exchequer receipt claiming for unfair termination.

With the above record, the CMA made a finding that a dispute before it was prematurely filed by the applicant before the disciplinary

hearing was conducted and thus no proof that the applicant was terminated. I also agree with the CMA finding because the applicant admit that he was paid salary for the month of December 2019 when the second notice of disciplinary hearing was issued to him. Instead of attending the hearing he opted to lodge a complaint. He submitted no evidence proving termination but claimed that he was asked not to to be seen at the workplace. This court in Labour Revision Application No. 24 of 2016 between **Leopard Tours Limited vs. Honest Peter Kessy and 2 others** (unreported) was faced with similar situation in which the respondents plainly complained to have been unfairly terminated from their employments by the applicant who seriously maintained that he did not terminate them. Justice Maige, J (as he then was now JA) held that:

> *"Mere denial of entry by a security guard in one day does not amount to termination of contract by the employer. The respondents would have by themselves, or their trade unions asked for formal clarification from the employer as to the status of their employments. In any event, in the absence of a proof of there being direction or approval by the employer, a security guard was not a person capable of terminating the services of the respondent. It is substituted by an order that the services of the respondents, had as of the date of the institution of the referral,*

not been terminated, the applicant is ordered to receive them in services and pay their salaries as of the date of the institution of the referral. The respondent cannot be paid for the period subsequent to the institution of the referral as in so doing they will be benefiting from their own wrongs."

I would like to subscribe the above decision and conclude that, the mere fact that the applicant was told by the country manager not to be seen at work as he has a pending disciplinary issue does not in itself amount to termination. As the respondent deny terminating the applicant, the applicant was bound to prove termination before shifting burden to the respondent to prove that the termination was fair.

Section 60(2) of the Labour Institutions Act Cap. 300 [RE 2019] which states that,

60 (2) In any civil proceedings concerning a contravention of a labour law-

(a) ***the person who alleges*** *that a right or protection conferred by any labour law has been contravened* ***shall prove the facts*** *of the conduct said to constitute the contravention unless the provisions of subsection (1)(b) apply; and*

(b) ***the party who is alleged*** *to have engaged in the conduct in question* ***shall then prove*** *that the conduct does not constitute a contravention.*

Section 39 of the Employment and Labour Relations Act No 6/2004 it provides that: -

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

From the quoted provisions, it is only where the issue is on unfair termination of employment is pleaded when the burden shifts to the employer otherwise the general principle regarding burden of proof in labour cases placed on who ever alleges. The matter under contention is stemmed on the claim that there was no termination thus, the provision governing the issue under consideration is section 60(2) of the Labour Institution Act (Supra) which ought to be read together with section 110 and 111 of the Tanzanian Evidence Act Cap 6 RE 2019. Since it was the position that the applicant was not terminated from employment, the applicant was duty bound to prove all the facts that could prove the said termination before the burden could shift to the respondent to prove that the termination was fair under section 39.

I am aware of the submission by the applicant that the respondent failed to confirm the service of the second letter (D3) which is invitation to the disciplinary hearing. He insisted that, such a meeting was never

conducted as per procedure. Even if we agree that the service was not effect, still it does not justify the existence of any termination of applicant's employment. The fact that the applicant instituted a labour dispute while the internal disciplinary mechanism was yet to be finalised, bars the applicant from raising a complaint for unfair termination.

On the claim that the Arbitrator failed to analyse properly the evidence and award does not reflect the proceedings, it is my view that the CMA analysed and considered the evidence relevant to the issue and hand before arriving to the conclusion. There is analysis of evidence from the parties and the CMA reasoning for regarding and disregarding some of the evidence. I therefore find this argument baseless.

On the third ground that, the Honourable Arbitrator erred in law and facts by holding that the termination was fair while the respondent failed to prove the same, this ground is misconceived. There is no where in the CMA award where the arbitrator started that there was fair termination of employment. In fact, the holding of the CMA was that the applicant was not terminated as he filed a labour dispute to the CMA before disciplinary hearing was conducted thus his claim could not be allowed.

It was also contended by the applicant that the Arbitrator erred by not considering that the disciplinary hearing was to be conducted even with absence of the respondent. I agree that under the law, disciplinary hearing can be conducted even in the absence of the employee if proved that the employee is evading invitation to the hearing and deliberately refuse to attend. In the present matter, the Arbitrator under page 6 of the award pointed out that the hearing was not conducted because before the date scheduled which is 14/01/2020, the applicant had already lodged a labour dispute with CMA on 10/01/2020. I find that to be a good ground for not conducting the hearing as there was a pending issue to be determined by the competent authority before they could proceed with other procedures. I therefore find this ground baseless as well.

From the above arguments and reasons there to, I find no reason strong enough to make this court temper with the decision by the CMA. The labour despite was prematurely filed at the CMA before the applicant could be terminated from his employment. This application is thus devoid of merit and its hereby dismissed. Considering the nature of this case, I make no order as to costs.

DATED at **ARUSHA** this 3rd day of March 2022

D.C. KAMUZORA

JUDGE