

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

AT TABORA

LABOUR REVISION NO. 04 OF 2020

PYXUS AGRICULTURE TANZANIA LIMITED -----APPLICANT

VERSUS

TIMOTH MATHEW KIONDO -----RESPONDENT

JUDGMENT

Date 20/12/2021 & 25/02/2022

BAHATI SALEMA, J.:

The applicant, **Pyxus Agriculture Tanzania Limited** was the employer of the respondent, **Timoth Mathew Kiondo**. The respondent was the applicant in the arbitration proceeding before the Commission for Mediation and Arbitration (CMA). The matter roots from the labour dispute number CMA/TBR/SKN/48/2019 referred to the CMA by the respondent/employee against the applicant/employer.

According to records filed with this file, the respondent filed a labour dispute at the Commission for Mediation and Arbitration for Tabora claiming unfair termination of service and in the end the respondent was awarded a total of TZS: 20,516,112/= being 27 months' salary for the months remaining in his contract.

Being aggrieved by the decision of the Commission for Mediation and Arbitration the applicant filed the present application, praying for the following orders: -

1. The Honourable Court be pleased to revise and set aside the award of the Arbitrator (Hon.Msuri) dated 16th March, 2020 in Dispute No. CMA/TBR/SKN/48/2019.
2. Costs of this application be provided for;
3. Any other order(s) or relief the Honourable Court may deem fit and just to grant.

The application is supported by an affidavit of the applicant's officer, one Sabatho Musombwa. The affidavit states four defects material to the merits of the dispute: -

1. *Whether the arbitrator's award was correctly procured according to law.*
2. *Whether the Arbitrator was correct for failure to appreciate the evidence adduced by the applicant.*
3. *Whether the arbitrator was correct for holding that the applicant failed to prove substantively the reasons for terminating the respondent while evidence on record was clear that, there were*

policies and company procedures that the respondents had breached/violated.

4. *Whether the Arbitrator was correct for holding that the applicant did not follow the laid down procedures in terminating the respondent.*

Further, the applicant stated one legal issue that he needs this court to revisit, and that is.

1. *That, the arbitration award, in this case, was manifestly unreasonable and improperly procured.*

A brief history leading to this application is that the respondent was employed by the applicant as Area Controller for Sikonge on a fixed-term contract renewable upon expiry. The applicant was first employed by the respondent from 01/10/2015 on a contract that expired on 30/09/2018. Subsequently, he signed another contract on 01/10/2018 which was expected to end on 30/09/2021.

The respondent claimed that on 14/10/2019 the employer summarily terminated his contract without justifiable reasons and without following proper procedures of law. He then referred the matter to the Commission for Mediation and Arbitration for reinstatement or

otherwise payment of his dues. The applicant was not satisfied with the Commission's award and filed the present application for revision.

Both parties were represented. Mr. Shukrani Mzikila, learned counsel represented the applicant, whereas Mr. Ngasa Mboje Ganja, also learned counsel represented the respondent. The hearing of the application proceeded by way of written submission.

In support of the application, Mr. Mzikila contended that the award by the arbitrator was improperly procured, having many legal flaws or defects, that, the award failed to take into account the testimonies of all three witnesses brought by the applicant and failed to assign reasons for doing so, contrary to rules 32(1) and (3) of the Labour Institution (Mediation and Arbitration) GN No.64/2007 which requires the arbitrator to correctly summarize arguments and evidence submitted by parties.

He submitted further by faulting the arbitrators' award for being contrary to Rules 27(1) and 27(3) (a-f) of the Labour Institutions (Mediation and Arbitration Guidelines) GN No. 67/2007 on the ground that the arbitrator did not conduct the hearing properly in respect of taking all of the evidence presented to him. That is, of all the exhibits admitted and labeled, he never considered any of the exhibits tendered by applicants. They added that the failure by the arbitrator to conduct

the hearing in accordance with the law made him miss an important piece of evidence presented before him.

Arguing on the award metered by CMA, Mr. Mzikila submitted that, the arbitrator solely relied on the evidence of the respondent, which was immensely challenged during cross-examination, but still relied on it and never considered the evidence adduced by the applicant. Lastly, Mr. Mzikila prayed to this court to grant the application and set aside the award.

Submitting in reply, Mr. Ganja elaborated that Labour Institution (Mediation and Arbitration) GN No. 64/2007 on Rule 32(1) imposes a duty on the arbitrator to keep a record of the arbitration proceeding. He added that the so-imposed duty is not to reproduce everything recorded in the proceeding to the award. On the assertion that the arbitrator did not take into board the testimonies of all three witnesses, Mr. Ganja stated that the applicant had overlooked the award because the arbitrator did summarize the testimonies of DW1 and DW2 as they appear on page 3 of the award.

To reinforce his argument, Mr. Ganja cited Rule 32(3) of the Labour Institution (Mediation and Arbitration) GN. No 64/2007 which reads:

“...the arbitrator is entitled to summarize the evidence and arguments submitted by the parties and record all key issues relating to the dispute.

It is his view that the arbitrator is vested with powers to determine which issues relating to the dispute can be included in the summary of evidence.

He submitted further that, Rule 27(1) and (3) of the Labour Institutions (Mediation and Arbitration) rules require the arbitrator to write and sign a concise award containing details of the parties, the issue in dispute, background information summary of the parties' evidence and arguments, and reasons for the decision and order. It is his submission that the award contains all the required features.

Furthermore, Mr. Ganja submitted that the award was passed in favour of the respondent because the applicant failed to prove that the respondent's termination was fair, as it was decided in the case of ***Macimillan Aidan Ltd vs Blandina Lucas Mohamed, Revision No. 292/2008*** that when the employee alleges unfair termination, the duty to prove the contrary lies with the employer. Lastly, he prayed that the application be dismissed.

From the above submissions, CMA record and CMA award, the issues for determination on the revision application are as follows: -

- 1. Whether the termination of the respondent's employment contract was fair.*
- 2. Whether the award was properly procured.*

In determining the first issue, whether the termination of the respondent's employment contract was fair, the law provides in section 37 (1) of the Employment and Labour Relations Act, 2004, that it shall be unlawful for an employer to terminate the employment of an employee unfairly. The same Act in section 37 (2) provides for the duty of the employer, in a dispute over the termination of employment, to prove that the termination was fair. The section reads as follows:

37.-(1) it shall be unlawful for an employer to terminate the employment of an employee unfairly.

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

(a) that the reason for the 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.*

The above section requires employers to terminate employees for valid and fair reasons and according to fair procedures. The failure of the employer to prove the fairness of the termination means that the termination was unfair.

Also, Rule 4 of the Employment and Labour Relations (Code of Good Practice) Rules, G.N. No. 42 of 2007, which provides that:-

4 - (1) an employer and employee shall agree to terminate the contract in accordance with the agreement.

(2) Where the contract is a fixed-term contract, the contract shall terminate automatically when the agreed period expires, unless the contract provided otherwise.

(3) Subject to sub-rule (2), a fixed-term contract may be renewed by default if an employee continues to work after the expiry of the fixed-term contract and circumstances warrant it.

(4) Subject to sub-rule (3), the failure to renew a fixed-term contract in circumstance where the employee reasonably expects a renewal of the contract may be considered to be an unfair termination.

In the present application, the evidence available shows that the respondent was employed by the applicant for a specific period of time, renewable upon expiry. The first contract commenced on 01/10/2015 and ended on September 30, 2018. He signed another contract on 01/10/2018 a contract that was expected to end on 30/09/2021.

According to rules 4 (1) and (2) of the G.N. No. 42 of 2007, the termination of the employment contract shall be in accordance with the agreement. For a fixed-term contract, the contract terminates automatically when the agreed period expires, unless the contract provides otherwise.

The record shows that the respondent's employment was terminated for failure to fulfill the duties of his role, which led to the loss of tobacco. It was further alleged that, the respondent allowed farmers into the warehouse and witnessed them stealing bundles of tobacco.

Having painstakingly gone through the record of this case nowhere is the amount of loss caused by the respondent mentioned. I tried to

find the same so that this court could weigh between the amount of loss caused and the penalty metered against the respondent.

At the CMA, the applicant's witness, one Dukho John Mahega (Dw1), informed the Commission that the loss that was caused by the respondent was more than two kilograms of tobacco. I quote:-

"Jibu Kinachozungumziwa ni upotevu wa tumbaku zaidi ya kilo mbili."

Also, on cross-examination, he was asked the following question, which I quote;

Swali *Je, wewe kama msimamizi unaweza kutueleza kuhusu hasawa (sic) aliyosababisha mlalamikaji*

Jibu *Sijui*

Also, DW2 had no information about the amount of alleged loss the appellant incurred due to non-fulfillment of duties by the respondent. This fact made me anxious to go further into the record to find out whether the disciplinary committee informed the respondent about the amount of loss caused by him. From the first to the last page of the committee report, nowhere did the committee ever mention to the

respondent the actual loss caused by him; rather, there is only an email stating poor performance at 1.08% in Sikonge Region.

Moreover, among the many allegations tabled before the respondent was that of allowing farmers into warehouses. I found a few discussions in the Committee minutes that will help me determine this issue, I quote.

"Kilonzo (mjumbe) aliuliza kwanini uliruhusu wakulima wote waingie ghalani wakati wa soko?"

Timoth Kiondo (Mlalamikiwa) alijibu kuwa yalikuwa ni maamuzi ya bodi ya Tumbaku (TTB)"

Another part that I found to be worth consideration is this: -

"Safari Laurance (Mjumbe) alimuuliza je, unadhani ni nani atafanya kazi ya ushonaji wa mitumba?"

Timoth Kiondo (mlalamikiwa) alijibu kuwa mitumba inashonwa na wakulima wenyewe pia taarifa kuhusu ushonaji wa mitumba ipo kwa menejiment tayari."

From the above-quoted replies by the respondent, it seems that farmers in Sikonge are allowed to enter warehouses because they are the ones who stitch tobacco bales. The statement seems to be true

because none of the members of the committee or witnesses at CMA ever challenged it. It is my view that the appellant knew that farmers in Sikonge are allowed to enter into warehouses, so I find no sin that was ever committed by the respondent.

Based on the above discussion, I find that the termination of the respondent's employment was not fair. Having found that the respondent was unfairly terminated, the second issue to be determined is whether the award of the CMA was properly procured.

Having read the ruling of the CMA, it is apparent that the arbitrator paid consideration to all witnesses that came before him, as is reflected on pages 3 and 4 of the ruling. Having said that, I uphold the decision of the Commission for Mediation and Arbitration and, consequently, the application is found unmeritorious, hence dismissed with cost.



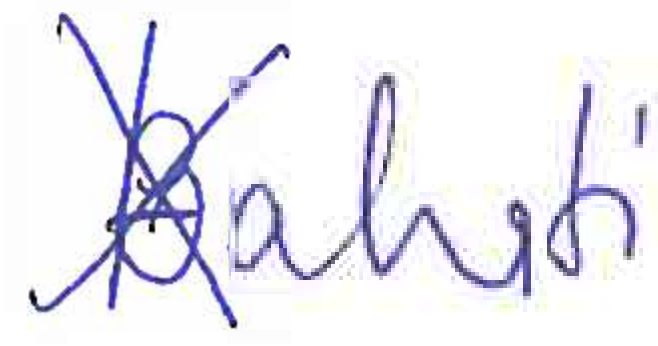
A. Bahati Salema

A. BAHATI SALEMA

JUDGE

25/2/2022

Ruling delivered under my hand and seal of the court in the Chamber, this 25th day of February, 2022 in the presence of both parties.



A. BAHATI SALEMA

JUDGE

25/02/2022

Right to appeal is hereby explained.



A. BAHATI SALEMA

JUDGE

25/02/2022

