IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LABOUR DIVISION)

TANGA DISTRICT REGISTRY

AT TANGA

LABOUR REVISION NO 06 OF 2021

(Originating from an Award of the Commission for Mediation and Arbitration at Tanga in Labour Dispute No CMA/TAN/01/2016)

TANGA CEMENT PLC.....APPLICANT

VERSUS

ISAACK MANDARA.....RESPONDENT

JUDGMENT

For a period of 17 years, (from May 1998 to December 2015) Mr. Isaack Mandara, the respondent herein has been working for the applicant, Tanga Cement Plc holding various positions. He started as a Process Engineer in July 1998 and eventually progressed to the position of a Process Performance Manager in April 2015. In between, he held other posts of Production Manager in 2008 and Clinker operations manager in 2014. His employment was terminated on 14th December 2015 for reasons of *negligence in the work, resulting in damage and loss of employer's property*. This is according to the termination of employment contract letter which is in record as Exhibit A11.

Displeased by the termination and after exhausting of internal procedures of appeal against termination in vain, the respondent filed in the Commission for Mediation and Arbitration, herein to be referred as "the commission or the CMA" a labour dispute baptised as CMA/TAN/01/2016. In the commission, the respondent claimed that he was unfairly terminated as the allegations of negligence on his part were not established. He therefore prayed for reinstatement without loss, employment benefits and rights. In the alternative, he prayed for compensation, severance pay, notice pay and bonus for the year 2015 plus general damages as may be awarded by the commission.

After both parties were heard the commission found that the termination by the respondent was unfair and granted the following reliefs; -

1. Compensation of thirty-six months remuneration to the tune of 6,977,136 x 36=251,176,896/= Tshs
2. Severance Pay calculated as 6,977,136 ÷ 24/7 x 10 = Tshs 20,349,980 since he worked for more than ten years
3. One month notice salary instead of notice equal to Tshs 6,977,136/= Tshs

The applicant was aggrieved by the award and hence filed revision immediately and it was termed as Labour Revision No 22 of 2019 which

was struck out with leave to refile by Hon. Judge Mkasimongwa. The present Revision is an aftermath of refiling. This application is brought at the instance of the applicant under Rules 24 (1) 24 (2) (a-f) and 24 (3) (a-d), Rules 28 (1), 28 (1) (c), (d) and (e) of the Labour Court Rules, GN No 106 of 2007 and Sections 91 (1), 91(1) (a) (b), 91 (2) (a), 91 (2) (b), 91 (2) (c) and 94 (1) (b) (i) of the Employment and Labour Relations Act, Cap 366 R.E 2019. The legal issues emanating from the award by the commission which the applicant seeks to challenge by way of this revision are; -

i. *The honourable CMA erred in law and fact in failing to appraise the evidence given by the Applicant and thereby reaching an erroneous conclusion that the respondent's termination was unfair.*
ii. *The Honourable Arbitrator erred in law and fact by stating that the respondent had no duty of care and did not breach the duty*
iii. *The Honourable Arbitrator erred in law and fact for issuing a biased, irrational, improper, unreasonable, unsolicited and unlawful award.*
iv. *The Honourable Arbitrator erred in law and fact in holding that the termination was unfair.*

v. *The Honourable Arbitrator grossly erred in granting excessive reliefs to the respondent.*

In this revision, the applicant was represented by Mr. Nuhu Mkumbukwa and acting for the respondent was Mr. Warehema Kibaha, both learned advocates. The matter was disposed by way of written submissions.

The core issue which parties in this matter are locking horns about is fairness or otherwise of termination of the respondent from employment by the applicant. At the CMA the honourable arbitrator, Ms. Warda S. Hamoud ruled out that the termination was unfair and hence proceeded to award reliefs as hinted earlier.

Parties in this case submitted considerably long submissions in support and against the application. I will not endeavour in recapitulating what they stated word to word but will undoubtedly consider such submissions in reaching the adjudication of this revision.

The first legal issue that the applicant herein faults the arbitrator is for finding that the termination of the respondent was unfair. The rest of the issues respires from this core issue. It is the applicant's submission that the arbitrator considered negligence of the applicant only basing on the shutting down of the kiln in October 2015 but failed to take on board

that the respondent was a Plant process Manager. Quoting his own words in writing, the applicant stated "It is trite law that an employee who is employed in a managerial position is required to perform duties with degree of professional skill and the skill required is so high." Despite stating that it is trite law, the applicant did not give this court te benefit of knowing which law he was referring to. In other words, the applicant is of the view that the negligent behaviour by which the respondent was terminated extends to the fact that he failed to properly advise his management on the possibility of the failure of the kiln that happened in October 2015. He termed this as poor performance of an employee and in persuading this court, he recited the South African precedent of *Ross Poultry Breeders (Pty) Ltd (JA9/97) (1997) ZALAC 3 (26 June 1997)* (not supplied) where the court stated that the principles of being warned first are not applicable to an employee such as a manager or a senior employee whose knowledge and experience qualify him to judge for himself whether he is meeting the standards set by the employer. In short, the averred that the employees in managerial positions have a strict liability when it comes to negligence in places of work.

Secondly, the applicant stated that the arbitrator ought to have considered the fact that the respondent was underperforming in his work and by history he had verbal discussions with him regarding performance which was followed by Performance Improvement Plan (PIP) tendered as Exhibit D1 which the respondent signed on 08th May 2015. He stated that even after the lapse of Performance Improvement Plan span, the respondent failed to analyse data and provide the appropriate recommendation.

In response to this issue, it was the Respondent's submission that under Section 37 (2) (a) and (b) of the Employment and Labour Relations Act, No 06 of 2004, before termination of Employment there must not only be a valid reason but also a fair reason for termination. Mr. Warehema cited the case of *Tanzania Revenue Authority vs Andrew Mapunda (2015) LCCD 1* in support. He also stated that the law under Rule 12(3) (d) of the Code of Good Practice, GN 42 of 2007 provide for a form of misconduct that suffice termination to be gross negligence. With regard to allegation by the applicant that the respondent displayed poor work performance, the respondent replied that under Rule 17 (3) of Code of Good practice GN 42 of 2007 as it is a matter of fact, the applicant ought to have provided proof of the same.

I have equitably canvassed through submissions of both parties with regard to the issue of fairness or otherwise of the termination by the respondent. It is not in dispute that the core reason why we are in this revision today is termination of the respondent from employment by the applicant. The reasons for termination as can be fetched from the letter of termination of contract of employment dated 14th December 2015 was ***negligence in the work resulting in damage and loss of employer's property.*** It is therefore without doubt that what the commission was required to find out in the labour dispute brought before it, is whether the respondent herein, Mr. Isaack Mandara was negligent in his work and as a consequence of his negligence there was damage and loss of his employer's property. That would subsequently answer the question of whether the termination from his contract was fair hence lawful or not.

Now, burden of proof of fair termination in labour matters is on the employer, this can be gleaned from Section 39 of Cap 366 R.E 2019. It provides; -

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

Most probably, it is for this reason that at the CMA although it was the employee who filed a complaint but it was the employer who started to give evidence so as to prove that the termination was fair. To prove the fairness of the termination, the applicant who was the respondent at the CMA brought to stand three witnesses; Mr. Benedict Lema, plant manager (DW1), Leen Breedt, Risk Manager (DW2) and Justine Joseph Monko, Maintenance Manager (DW3). As for the respondent herein who was the applicant, stood Isaack Mandara himself and Steven Madundo, former Production Manager as his witness.

So as to establish negligence of the respondent which led to termination, the applicant was to establish whether the respondent had a duty of care, whether he breached that duty and lastly whether there was damage and loss that occurred as a result of such breach. That way negligence would be established.

Duty of care could be safely derived from the respondent's job description at the applicant company. The alleged negligence is said to happen on 18th October 2015 when the kiln was forced to stop due to the fact that brick thickness measurement analysis was not technically sound, consequently resulting to kiln red spot on 17th October, 2015. (See Exhibit D7).

Up to the day of his termination in December 2015, the respondent held the position of a Process performance manager reporting to the Plant manager, one Benedict Lema since April 2015. According to Exhibit A5, a letter dated 13th April 2015 which changed his role to being a process performance manager, the respondent's job description was to be handed to him by his line manager. After that change of role, there is nothing in record that indicates that he was equipped with that role's description. At page 18 of the proceedings of the CMA, when cross examined by the respondent, the applicant's witness DW1 Mr. Benedict Lema stated that he does not know whether the job description was handled to the respondent. He further admitted that even in the disciplinary hearing, the applicant's job description was not tabled for discussion, (page 18 of the proceedings).

It is however in record that DW1 Benedict Lema was the one entitled to oversee the effectiveness of the machines (See page 7 of the proceedings). According to DW1, the respondent played an advisory role and the mistake leading to his termination is the failure to properly advise him. This wrong advice nevertheless was not in writing. At page 18, DW1 states that the advice by the respondent to him was verbal. It is this alleged verbal advice which led to termination of the respondent.

In the course of giving his evidence, DW1 Mr. Benedict Lema also tendered in evidence Performance Improvement Plan, (PIP) as Exhibit D1 to show that the performance by the respondent was at one time, deteriorating. However, he did not state the outcome of the Performance Improvement Plan. Since the PIP was used to observe the respondent from April 2015 for a period of 90 days, then it was expected that as proof that the performance had not improved, the applicant would tender the result of the improvement plan after the lapse of 90 day's span. At page 17 of the typed proceedings, DW1 stated that he did not think that it was important to tender the results of the PIP.

In law, failure to tender material evidence in one's possession implies that had it been tendered, its effect would be adverse to the wishes of the one who did not tender it. See the CAT case of *Benard Masumbuko Shio and another vs The Republic Criminal Appeal No. 213 of 2007.* This only means that his outcome was that the performance by the applicant did improve.

DW1 also admitted that he played part in pushing the machines to keep operating until January 2016 also that several power cuts and interruptions in 2015 was contributory to the problem which occurred. At

the CMA, DW1 insisted that the respondent caused a loss of 1.8 billion to the company due to his negligence. This figure is not substantiated by any document whatsoever, there is also nothing to verify that the kiln referred to, was destructed or damaged.

There is also evidence on record that the respondent prior to the stoppage in October 2015, prepared a technical volume budget which indicated that the next shut down was supposed to be in October 2015, and that the applicant through Benedict Lema was aware of the shutdown bound to occur in October 2015.

DW2 Leen Breedt, risk manager of the applicant company when giving evidence admitted that job description of Mr. Isaack Mandara was not produced in disciplinary hearing. He stated that the fact that Mr. Mandara did not say anything during the disciplinary hearing to defend himself led to his termination.

DW3 on his part, explained and admitted that all of the team including DW1, him and Mr Mandara had decided and agreed to push the kiln to work until January 2016 instead of October 2015 although they had already done 2 parchments. He insisted that the decision to push the plant to work until January 2016 was made in a meeting and was a decision by the members of the meeting, who were Michael Uzibe,

Simon Kikote, Steven Madundo and Isaack Mandara, Isaack being the chairperson of the same. This can be readily found at pages 45 and 46 of the typed proceedings. This only means that when damage occurs the blame could not be shouldered on the respondent as a sole wrong doer.

At page 47 of the proceedings DW3 kept explaining how difficult it was for Mr Mandara, the respondent to perform a thickness test on the plant so as to give an informed advice as that would have to involve removal of coating layer which could lead to more danger.

At page 48 of the proceedings, the commission further examined DW3 and he stated that the mandate to stop the plant was on the plant manager who receives advice from, process manager. However, he must not be bound by the advice, he had an option of rejecting the same. At page 54 of proceedings this witness testified that the stoppage that occurred in October 2015 was a result of breakdown not negligence.

I have observed through proceedings and documents tendered at the CMA as exhibits while taking into account the Employment and Labour Relations (Code of Good Practice) as required by Section 37 (4) of the Employment and Labour Relations Act, Cap 366 R.E 2019. It is crystal clear that it was for the first time the respondent was subjected to a

disciplinary hearing yet he was terminated. Rule 12 (2) of the Employment and Labour Relations (Code of Good Practice), G.N. No. 42 of 2007 provides ;-

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

Given the evidence on record, the problem with the kiln was not the respondent's fault per se. In that sense, this court, like the honourable arbitrator hold that his termination was substantially unfair. Fairness of termination was not merely procedural but substantive. Although the applicant alleged that there was poor work performance by the respondent, the evidence available betrays him. In labour matters as hinted earlier, proof of poor work performance is a question of fact to be determined on a balance of probabilities. Further, the Employment and Labour Relations Act provides under Section 37 that it shall be unlawful for an employer to terminate the employment of an employee unfairly.

What to do in this situation, where the court finds that termination was unfair; it is settled law that the substantively unfair termination attracts heavier penalty as opposed to procedural unfairness which attracts

lesser penalty (See Felician Rutazwa vs World Vision, Civil Appeal No 213 of 2019 (CAT).

In conclusion, this court finds no reason to revise the proceedings and award by the Commission given on 02nd July 2019. The application is therefore dismissed in its entirety and this being a labour matter, each party shall bear its/his own costs.

DATED AND DELIVERED AT TANGA THIS 1ST APRIL 2022.

THE HIGH COURT OF TANZANIA

L.MANSOOR

JUDGE

1ST APRIL, 2022