IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT MOSHI

LABOUR REVISION NO. 22 OF 2022

(Arising from Labour Dispute No. CMA/KLM/MOS/ARB/26/2021)

GEORGE PHILLIP KIMARIO ..... APPLICANT

VERSUS

IRONSIDES LIMITED ..... RESPONDENT

JUDGMENT

02/08/2023 & 08/09/2023

SIMFUKWE, J

George Philip Kimario hereinafter referred to as the Applicant filed this application after being aggrieved with the Award of the Commission for Mediation and Arbitration in **Labour Dispute No. CMA/KLM/MOS/ ARB/26/2021** of Moshi dated 22nd July 2022. The application was brought under **section 91 (1)(a), Section 91 (2) (b)** and **Section 94** (**1) (b)(i) of the Employment and Labour Relations Act, No. 6 of 2004, Cap 366 R.E 2019 (ELRA);** read together with **Rule 24 (1) (2) (a) (b) (c) (d) (e)** and **(f), rule 24(3)(a)(b)(c)** and **(d)** and **Rule 28 (1)(b)(c)(d)** and **(e) of the Labour Court Rules, GN No. 106 of 2007.** The Applicant prayed for the following orders:

1. *That, this Honourable Court call be pleased to call for records, revise and set aside the Arbitrator's Award dated 22/07/2022 by Hon. M. Batenga (Arbitrator), made in Labour dispute No.* ***CMA/KLM/MOS/ARB/26/2021*** *between George Phillip Kimario versus Ironsides Limited, on grounds set forth in the annexed affidavit and any other grounds as shall be adduced on the hearing date.*
2. *That, this honourable court be pleased to determine the matter in the manner it considers appropriate and give any other relief it considers fit and just to grant.*

The application was supported by an affidavit sworn by the applicant, which was contested by the counter affidavit sworn by Victor Mkolwe, Principal Officer of the respondent.

The factual background of the dispute is to the effect that, the applicant was employed by the respondent as a Security Guard from 1st November 2018. It happened that on 24/02/2021 his employment was terminated on the ground that the applicant failed to prevent theft while on duty which resulted to theft of 3 axels of the rear wheel of the motor vehicle with registration number T.669 AGL make Fuso.

The applicant was irritated with such termination, he filed his complaint before the CMA claiming compensation at the tune of Tzs 5,349,000/=. After considering evidence of both parties, the CMA found that the termination was lawful both procedurally and substantively. It ordered the respondent to pay the applicant Tzs.150, 000/= only as leave allowance.

Aggrieved with the decision of the CMA, the applicant filed this application on the following grounds:

1. *That, the Hon. Arbitrator erred in law and in fact by not considering and evaluate properly the disputable issues drawn before her.*
2. *That, the Honourable Arbitrator erred in fact and in law by holding that the Applicant's mere attendance at the Disciplinary hearing suffices that fair procedure was adhered.*

The application was ordered to proceed through filing written submissions to the effect that the applicant was required to file his submission in chief by 28/06/2023, reply submission was to be filed by 12/07/2023 and rejoinder by 19/07/2023. The applicant successfully filed his submission in chief in time. However, the respondent failed to file his reply submission as ordered and failed to enter appearance without notice. Thus, the matter was set for judgment.

The Applicant was unrepresented. On his introductory remarks, the applicant raised preliminary objection to the effect that the counter affidavit filed by respondent is defective and completely bad in law for containing prayers.

In support of the grounds of revision, the applicant submitted that according to **regulation 8(1)(a)** and **(d) of GN No. 42 of 2007** an employer can fire an employee if he has followed the terms of the contract in relation to dismissal and has complied with the terms of **section 41** to **44 of the ELRA.** That, the said provisions provide for notice of dismissal, severance pay, transportation to the place where he was taken during

employment and payment. Also, the employer should follow the legal procedure before terminating the employment and must have a valid reason to do so as prescribed under **section 37(2) of the ELRA**.

The applicant contended that it is undisputed fact that the respondent did not comply with **rule 8 of GN No. 42 of 2007** and **section 37(2) of ELRA** when terminating the contractual agreement of the applicant. He was of the view that, the CMA erred to rely on weak and unbelievable evidence that the applicant was invited to attend to the meeting of disciplinary committee and finally to suggest that, the applicant be terminated. He argued that even the property thought to have been stolen was never reported to any police station for criminal investigation in order to find out where that property was. That, it was an employment termination of its own kind. He believed that justice should not only be done but should be seen to be done.

In his conclusion, the applicant prayed the court to grant the application with costs and the CMA award be quashed and set aside. Also, he prayed his claims in CMA Form No. 1 be granted and any other relief this court may deem fit and just to grant.

According to the submission of the applicant, affidavit in support of the application, counter affidavit and evidence on CMA record, I am of considered view that, issues for determinations are the following:

1. *Whether there were valid reasons for termination of Employment*

of the applicant

2. Whether the employer adhered to fair procedures.

3. To what reliefs each party may be entitled to?

Starting with the first issue on whether the applicant was terminated on justifiable reasons; the law governing matters of termination is the **Employment and Labour Relations Act,** (supra) and the **Employment and Labour Relations (Code of Good Practice Rules) 2007, GN No. 42 of 2007** (Code of Good Practice). For ease reference I quote the provisions as hereunder. **Section 37(2) & (4) of ELRA**, provides that:

> *"(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*
>
> *(4) In deciding whether a termination by an employer is fair, an employer, arbitrator or Labour Court shall take into account any Code of Good Practice published under section 99."*

Rule 9 (3) of Code of Good Practice (supra) provides that:

> *"...the burden of proof lies with the employer but it is sufficient for the employer to prove the reason on balance of probabilities...."*

In the case of **St. Joseph Kolping Secondary School vs Alvera Kashushura (Civil Appeal 377 of 2021) [2022] TZCA 445** at page

12 the Court of Appeal had this to say in respect of termination of employment:

> *"Termination of service is said to be fair according to section 37(2)* ***if it is based on fair and valid reasons and carried out in observance of fair procedures stipulated in the provisions of ELRA.*** *The fairness requirement under the ELRA emanates from the provisions of Termination of Employment Convention 158 of 1982, which establishes the core elements of the employee's rights as to include requirement for valid reason for any termination. The Convention recognizes three valid reasons as misconduct, incapacity and operational requirements which have been duly incorporated in section 37(2) (b) (i) and (ii) of the ELRA."* Emphasis added

In the case at hand, the applicant was terminated from employment on the reason of failure to prevent theft as a security guard.

The Arbitrator at page 7 to 9 of the Award when dealing with this issue elaborated the reasons for termination of the applicant to substantiate the findings that the termination was fair. At page 9- 10 the learned Arbitrator had this to say:

> *"Kama mlinzi mlalamikaji alikuwa na wajibu wa kulinda mali zilizomo katika lindo la Marenga, je hakutekeleza wajibu wake na kupelekea wizi wa mali ya mteja wa mwajiri wake?*
>
> *Tume imerejea Kielelezo IR-4 taarifa aliyoandika mlalamikaji siku ya tarehe 24/01/2021 saa 12 jioni ameandika humo,*

"TAARIFA YA KUPOKEA LINDO ISAR 654 George P. Kimario Najulisha kuingia lindo zamu ya usiku na kwamba hali ya lindo ni 4/5"

Kwenye taarifa yake ya tarehe 25/01/2021 wakati anatoka lindoni na kukabidhi kwa mwingine aliorodhesha mali alizolinda usiku huo aliandika kwenye taarifa hiyo,

…

Katika mali alizokabidhi mlalamikaji siku hii moja wapo ni gari namba T669 AGL ambayo ndiyo gari iliyoibiwa axle tatu. Mlalamikaji alikana kukabidhiwa gari hii wakati anaingia lindoni lakini taarifa yake ya kukabidhi inathibitisha gari hiyo ilikuwepo lindoni na kama Mlinzi alikuwa na wajibu wa kulinda lakini alishindwa kutimiza wajibu wake na kusababisha upotevu wa sehemu ya mali hiyo. Ni dhahiri kuwa mlalamikaji alitenda kosa la uzembe kazini na kusababisha hasara kwa mwajiri wake.

Kanuni ya 12(3)(d) ya Employment and Labour Relations (Code of Good Practice) Rules, G.N 42/2007 (itajulikana kama The Code) imeeleza kwamba kosa la uzembe ni kosa ambalo linahalalisha usitishwaji wa wa ajira na kwa mantiki hii basi mlalamikiwa alikuwa na sababu ya msingi kumuachisha kazi mlalamikaji."

It is on the basis of the above findings that the applicant on the 1st ground of Revision faulted the CMA for failure to analyse the evidence properly.

The applicant was charged and dismissed from employment for failure to prevent theft while on duty. I am of considered opinion that, under such claims, the respondent/employer was required to prove that indeed the theft was committed while the applicant was on duty and that it was the duty of the applicant to prevent the said theft.

According to DW1, DW2 and DW3, they were informed about the theft which occurred at Marenga where the applicant was placed on duty. DW4 testified that he was the one who discovered the occurrence of the said theft. In proving the above elements, as the proceedings speaks, the respondent's witnesses apart from alleging that the said theft occurred, there is no any evidence to prove that the said theft indeed occurred. The witnesses did not call even the complainant whose property was stolen to testify before the CMA or before the disciplinary hearing. At page 11 of the typed proceedings when cross examined, DW2 stated that the stolen properties belonged to Marenga. However, they did not call the said complainant (Marenga) to testify. At page 13, DW3 when cross examined stated that the said Marenga was not called before the disciplinary hearing as witness to confirm that his properties were stolen. Worse enough, the alleged theft was not reported at any police station as initial process of initiating criminal cases.

Based on the above scrutiny, I agree with the applicant that the Arbitrator did not scrutinise the evidence of the employer thoroughly to prove the alleged misconduct/negligence committed by the applicant.

According to the applicant, he handed over the duty station to another security guard and there was no any allegation of the said theft. According to PW2 who was at the duty station with the applicant, he said that there

was no report of theft when they handed over the duty station (*lindo)* and that the said station was okay.

In the circumstances, this being the first appellate court, my re-evaluation of evidence on record tells me that the applicant was terminated unfairly since the respondent failed to prove that the applicant was terminated based on fair reasons.

Turning to the second issue of procedures, according to the Arbitrator at page 10 of the CMA award, she was satisfied that the procedures as enshrined under **Regulation 13 of the Code of Good Practice** was adhered to. She said that:

> *"Mlalamikaji hakueleza ni taratibu zipi hazikufuatwa na mlalamikiwa lakini alikiri kupewa hati ya mashtaka na kuhudhuria kikao cha nidhamu akiwa na Mwakilishi. Pia, Kielelezo IR-1 fomu ya mwenendo wa kikao cha nidhamu inathibitisha mlalamikaji alihudhuria kikao cha nidhamu, kesi yake ilisikilizwa na mwishoni kuamuliwa aachishwe kazi…"*

The applicant at page 20 of the typed proceedings testified that he was summoned to attend the disciplinary hearing and he was given a prior notice. At page 22 during cross examination, he stated that he was served with the charge and he appeared together with his representative one Amos Mbise. Basing on such evidence, I support the findings by the Arbitrator that the procedures were followed as enshrined under **regulation 13 of the Code of Good Practice.**

The last issue for determination is what reliefs are the parties entitled? According to the applicant's CMA No. F1, he prayed for the following: One month salary of Tzs 150,000/= in lieu of notice, leave allowance of Tzs 150,000, Severance pay Tzs 81,000, Overtime of 528 hrs Tzs 3,168,000/=, 12 months' salary compensation for unfair termination -Tzs 1,800,000/=. Grand Total = 5,349,000/=.

The CMA's Award at page 12 discussed very well the issue of overtime claims. I am of the same opinion as the Arbitrator that since there was no agreement between the applicant and his employer to work for overtime, then the applicant is not entitled to overtime payment.

However, since this court has found that the termination was unfair, under **section 42(1)(2) and (3) (a) of ELRA**, the applicant is entitled to the following reliefs:

i. Tzs 150,00/= in lieu of Notice

ii. Leave allowance Tzs 150,000/=

iii. Severance pay Tzs 81,000/= and

iv. 12 months' salary as compensation for unfair termination 1,800,000/=.

Thus, the total amount to be awarded to the applicant is Tzs 2,181,000/=.

Consequently, I hereby quash and set aside the Arbitrator's award. In the alternative, I hereby order the respondent to pay the applicant compensation to the tune of Tzs 2,181,000/= for terminating him unfairly as the reason for termination was not proved on the required standard. No order as to costs.

It is so ordered.

Dated and delivered at Moshi this 8th day of September 2023.

X

S. H. SIMFUKWE
JUDGE
Signed by: S. H. SIMFUKWE

08/09/2023