IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF SHINYANGA

AT SHINYANGA

LABOUR REVISION NO. 25 OF 2021

(Arising from CMA award date 29th day of June, 2021 in Labour Dispute)

N0. CMA/SHY/252/2020)

ZEM DEVEOPMENT (T) LIMITED.....APPLICANT

VERSUS

ZELLAFON MUKAMA.....RESPONDENT

JUDGMENT

22nd August & 12th September 2023

F.H. MAHIMBALI, J

The applicant who was the respondent at the trial CMA has been aggrieved by its decision which was in favour of the respondent for unfair termination.

The brief facts behind this saga go this way. The respondent was a driver by the applicant's company on fixed term of one-year employment contract from 1st January 2020 to 31st December 2020. On 20/11/2020 the respondent who was assigned to transport consignment from Butiama to Mwakitoryo Shinyanga, on the course of transportation, he got an accident. The applicant's motor vehicle was then damaged and thus caused major loss to the applicant's vehicle.

Being the case, on 20th 26th November 2020, the applicant issued a letter for termination against the respondent on the account that the respondent committed gross misconduct on course of discharging his duty as he drove the said vehicle and caused accident while being under influence of alcohol.

Aggrieved by the action taken by the applicant, the respondent preferred the matter before CMA. After a full trial, the CMA ruled in favour of the respondent that the applicant unfairly terminated his employment contract.

The CMA then awarded compensation equal to 12 months' remuneration, severance pay and an annual leave payment. Whereby a total of Tshs 4,061,000/= were ordered to be paid to the respondent.

The applicant was unhappy with the award of CMA, he has then approached this Court by way of revision on the reasons that the CMA decided the matter based on the issue which was not before it and without according the parties to be heard on the effect.

During the hearing of this application, the applicant had legal representation of Alfred Daniel Sotoka learned advocate while the respondent had a legal representation of Mr. Abasi Abdi- TPAWU.

Arguing for the application, Mr. Sotoka prayed for the applicant's affidavit be adopted and form part of his submission. He also averred that the main concern of the revision of the award of the CMA is whether the arbitrator was right to raise an issue *suo moto* and without affording the parties an opportunity of being heard. Mr. Sotoka also submitted that the issue before the CMA was whether the termination was lawful, but the arbitrator *suo motto* raised and discussed a new issue whether the contract between the parties was for specified or unspecified period.

However as per evidence before CMA by the applicant, the contract was for one year which commenced from 1st January 2020 to 31st December 2020. He contended that a contract of an employment can either be for specific time or unspecified time. If the contract is for unspecified time, the issue of unfair termination falls under sections 40,41, and 44 of the ELRA, Cap 366.

Mr. Sotoka also added that if the contract is periodic, the issue of unfair termination cannot fall under the above provisions.

Therefore, Mr. Sotoka argued that what was ruled by the CMA that the respondent was unfairly terminated was not proper as per law. He referred this court to Rule 8(1)(1) and (2) of Employment and Labour Relations, Code of Good Conduct GN.42 of 2007.

Meanwhile, Mr. Sotoka submitted that, since in this case the contract between the applicant and the respondent was for fixed term, the issue of unfair termination in the circumstances of this case cannot hold water. He persuaded this court by referring to the decision in the case of **Serenity on the Lake Ltd versus Dorcas Martin Nyanda, Civil Appeal No.33 of 2018.**

He also added that unless there is material breach by the employee, the employee is not supposed to be unfairly terminated by the employer. Thus, since the arbitrator wrongly based his decision on unfair termination then compensation award of twelve months was not proper.

Mr. Sotoka also alluded that as the issue before CMA was unfair termination, it was not proper for the arbitrator to raise that issue suo moto and proceeded to determine without first according the parties with the right of hearing.

Mr. Sotoka further argued that, as to whether the arbitrator was correct to order payment of annual leave in the circumstances of this case. He was of the view that, it was not proper as the respondent had not yet completed twelve months of employment consecutively.

Lastly, Mr. Sotoka added that as per award at page 11 of the CMA's ruling/award, seems that the respondent was paid all the three months'

salary suggested he was paid the salary of the two remaining months; November & December and the one-month salary in lieu of notice and therefore the CMA award is legally unfounded as the respondent was dully paid. He then pressed for the application to be granted.

On the side of the Respondent, Mr. Abasi Abdi – a representative from TPAWU submitted that, as per section 14 of ELRA, there are three types of contracts; specified time, unspecified time and for special work.

As per this case, the contract between the parties was for specified time. And such contract did not reach to an end as he was terminated allegedly on disciplinary grounds and for want of compliance of work procedures.

He submitted that, despite the fact that the respondent was involved in the said motor accident, according to labour laws, he was not supposed to be summarily dismissed from the said employment, unless he was first sued for such gross negligence.

He added that section 40 (1) 0f the ELRA provides that a person unfairly terminated ought to be paid a minimum of 12 months' salary. Since the applicant is a company, it must have a code of conducts through which the respondent would be sued, that was not a case in this matter.

Mr. Abasi then pressed that based on his submission the application be dismissed for want of merit.

In rejoinder Mr. Sotoka reiterated what he submitted in chief that the CMA's award in the circumstances of this case is illogical.

Having heard the parties on their rival submission, I have now to determine this application and the main issue to be considered is to whether this application is merited.

The matter of termination of employment is regulated by section 37 of the Employment and Labour Relations Act (supra). For easy reference the same is hereby reproduced hereunder;

> *"(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 if it- (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.*
>
> *(3) N/A*

(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 "

These are the conditions for the court to find that the termination of employment of the employee by the employer is fair. The code of good practice referred to by subsection 4 of section 37 is the Employment and Labour Relations (Code of Good Practice) G.N. No. 42 of 2007 and the relevant provision which is required to be relied upon by the arbitrator or the Court is Rule 12(1) of the Employment and Labour Relations (Code of Good Practice) G.N. No. 42 of 2007 which provides that;

"Any employer, arbitrator or judge who is required to decide as to whether termination for misconduct is unfair shall consider- (a) whether or not the employee contravened a rule or standard regulating conduct relating to employment; (b) if the rule or standard was contravened, whether or not (i) itis reasonable; (ii) itis dear and unambiguous; (iii) the employee was aware of it, or could reasonably be expected to have been aware of it; (iv) it has been consistently applied by the employer; and (v) termination is an appropriate sanction for contravening it. The law continues to provide for limits of the employer in terminating the employee, under sub rule (2), (3), (4) and (5) as follows; (2) 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. (3) The acts which may justify termination are; (a) gross dishonesty; (b) wilful damage to property; (c) wilful endangering the safety of others; (d) gross negligence; (e) assault on a co-employee, supplier, customer or a member of the family of, and any person associated with, the employer; and

(4) In determining whether or not termination is the appropriate sanction, the employer should consider: - (a) the seriousness of the misconduct in the light of the nature of the job and the circumstances in which it occurred, health and safety, and the likelihood of repetition; or (b) the circumstances of the employee such as the employee's employment record, length of service, previous disciplinary record and personal circumstances.

(5) The employer shall apply the sanction of termination consistently with the way in which it has been applied to the same and other employees in the past, and consistently as between two or more employees who commit same misconduct."

From these provisions, it is glaringly clear that, section 37 of the Employment and Labour Relations Act (supra), must be read together with the Code of Good Practice made under section 99 of the Employment and Labour Relations Act.

These two laws when read together, the following are the clear directives to be complied with before the verdict of termination is imposed by the employer and upheld by Arbitrator or the Court;

(i)The employee may be terminated if he/she has contravened the known rule or standard which is reasonable, clear, and free from ambiguity and the employee was aware of it or ought reasonably to be aware of it.

(ii) Generally, the first offence/misconduct of an employee shall not justify termination.

(iii) The termination may exceptionally base on the first offence/misconduct if it is proved that the misconduct is so serious that it makes a continued employment relationship intolerable

(iv) If that offence/misconduct relates to damage to the property of employer, then it must be established that the act was done wilfully.

(v) Taking into account the nature of the job and the circumstances in which it occurred that misconduct is so

serious to endanger health and safety, and there is a likelihood of repetition.

(vi) Looking at the circumstances of the employee such as the employee's employment record, length of service, previous disciplinary record and personal circumstances, the misconducts merits termination.

(vii) That the termination is the appropriate sanction for contravening the code. The evidence of compliance with the above conditions can be found nowhere else but on record.

Now, following his unprocedural termination the Respondent sued the applicant for termination of his employment contract. See CMA F.1, and claimed to be paid reliefs to wit; notice, severance pay, leave, treatment expenses, compensation of twelve months' salary.

Since the matter was for termination of contract, then the applicant was burdened to prove the termination of respondent's employment was fairly done.

Before the hearing commenced, the parties had agreed to the framed issues which are;

1. what type of contract is entered between the complainant and the respondent,

2. Whether there is valid cause for termination,

3. whether fair procedure for termination was followed and

4. What reliefs parties are entitled to.

Therefore, the CMA award was supposed to confine with the above raised issues.

The applicant's major complaint herein is that, the Hon. Arbitrator erred to found his award basing on the issue which was not before it; therefore, the parties were not afforded with the right to be heard.

I have done my thorough findings to see the gist of what is being complained by the applicant's counsel. In my considered view, I find nothing strange discussed beyond the scope of the framed issues which formed the basis of the said decision.

It is undisputed that the employment contract between the parties were of designed for a period/ specified term of one year starting from 1st January 2020 to 31st December 2020.

Mindful, it was alleged that the termination of respondent's employment contract was due to misconduct committed by the respondent, by driving applicant's truck while is under influence of alcohol and driving a vehicle during night hours contrary to the instruction given to him.

My concern is on issue No.3 raised at the trial, which aimed at looking as to whether procedures for termination of the respondent's employment were followed. And that was the basis of the decision of the CMA.

Both parties had conceded that if there is unfair termination, then Sections, 40,41 and 44 of ELRA comes in place. The law also recognises that if the employment contract is of less than 6 months' employment with the same employer, whether under one or more contracts cannot be held to be unfair termination. This means that for an employee to claim for unfair termination must be employed for a fixed term of contact of more than six months.

Now, in the case at hand the respondent had fixed term contract which was supposed to lapse on 31st December 2020, but was terminated on 26th November 2020 which is one month before, on reasons for misconduct.

Therefore, the test is whether the applicant complied with legal frame work before terminating the respondent's employment. The reliance by Mr. Sotoka, counsel for the applicant that the termination was lawful in line with the decision in the case of **Serenity on the Lake Ltd versus Dorcas Martin Nyanda, Civil Appeal No.33 of 2018,** is misconceived as in that case, the Court of Appeal discussed a scenario where one's contract of employment expires, then termination is automatic and there is no need of notice of termination (see also Rule 4(2) and 8 (2) a of the Employment and Labour Relations (Code of Good Practice), GN No. 42 of 2007). Thus, it is a distinguished scenario from the situation at hand.

Based on the discussion above, I have come across with exhibit D2 which is termination letter, which shows that the reason for respondent's employment termination was gross misconduct, and dishonest contrary to the applicant's code of conduct.

It was further alleged by the applicant that the respondent failed to follow instruction given to him which required him not to travel during night hours but intentionally forced and travelled, and as the result while on the journey got accident and damaged the applicant vehicle, worse enough the respondent drove the applicant vehicle while is under

influence of alcohol contrary to the norms and conduct of the applicant as the result he caused major loss to the applicant.

The act by the respondent was intolerable and the applicant on 26th November 2020 reached the decision to terminate respondent employment contract by giving termination letter. See Exhibit D2.

The law requires that an employee before his employment is terminated ought to be called for disciplinary meeting first by giving him a notice for hearing, reasonable time to prepare for defence, charge of accusation and right to cross examine the opposite party, see Rules 13 of the Employment and Labour Relations (Code of Good Practice) (supra).

I have cautiously gone through the records, in particular to satisfy myself on the alleged claims against the respondent. There is no proof of evidence that the respondent when driving the vehicle of the applicant was under influence of alcohol as alleged by Ramadhani Juma Bunyesi deputy manager of the applicant who stated.

> *"That the company made investigation and found out that Zellhaforn Mukama was driving the truck under influence of alcohol"*

Taking on consideration that the deputy manager was not at scene and therefore the investigation report was supposed to be produced before the CMA for its scrutiny.

The respondent has established that the accident was due mechanical problem which was beyond his ability. He furnished the commission with vehicle inspection report which is exhibit P1.

From that statement above, what I can see is that the applicant had the burden of proving the validity of the reasons for termination of the respondent as per Section 39 of Employment and Labour Relations Act, Cap 366 RE 2019 which provides that:-

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

This was also held in the cases of **Muhimbili National Hospital vs. Constantine Victor John, Civil Appl. No. 44/3013 and DAWASCO Vs. Abdul Swamadu Rwegoshora, Rev. No. 259 of 2008**.

In the case of **Abdul Karim Haji V. Raymond Nchimbi Alois and Joseph Sita Joseph [2006] TLR 419**, it was held that: -

"It is an elementary principle that he who alleges is the one responsible to prove his allegations".

Also see the case of **Masolele General Agencies Vs. African Inland Church Tanzania, [1994] TLR 192** it was stated that:-

"But on our part, we are satisfied that the trial Judge's view on the burden of proof were correct. Once a claim for specific item is made, that claim must be strictly proved..."

The burden of proof is expected to be more than on balance of probabilities. The applicant's evidence was not sufficient to prove the allegations against the respondent. Therefore, the reasons for termination of respondent's employment were unfounded.

On the Second issue regarding procedure for termination, Rule 13 of the Code, provides for procedure for termination of an employee. There are various courts' decisions that, the procedure for termination need not to be complied in a checklist form. What is important is adherence to the rules of natural justice i.e, right to be heard and to defend from the allegations.

From the records, it is clear that there was no any disciplinary meeting which was held justifying the respondent's termination. Neither

notice to attend hearing, nor charge was made against him, it is only the letter for termination (D2 exhibit).

At page 5 of the trial Proceedings during cross examination when asked whether there was any disciplinary hearing prior to the respondent's termination, the respondent's manager replied:

> *"Disciplinary hearing is done prior to termination. We called the complainant orally to the disciplinary hearing. It was informal meeting, there was no notice to attend that hearing because that procedure was unknown to the company"*

Exhibit D1 which is a copy of contract between the parties under clause 16 provides for termination of employment. The same provides that;

> *"your employment may be terminated for a fair reason and in accordance with a fair procedure. Seven days' written notice, submitted to you, will be required to terminate your employment with the company"*

Clause 17.1 exhibit D1 provides disciplinary machinery to deal with the dispute in relation to contract which is the Board.

As I have recapitulated the facts and evidence pertaining to this case, you may now grasp that the applicant did not adhere first to the procedures enshrined in the contract entered between the parties and not followed the prerequisite procedures for termination of the respondent's employment contract.

Rule 13(5) (supra) provides;

> *"The Evidence in support of allegations against the employee shall be presented at the hearing. The employee shall be given a proper opportunity at the hearing to respond to the allegations, question any witness called by the employer and to call witness called by the employer and call witnesses if necessary"*

In the case of **NBC Ltd Mwanza v. Justa B. Kiyaruzi Revision No. 79/2009** HC Labour Division Mwanza Sub registry (Unreported) where was held that;

> "*Ingredients of fair hearing are the right to be made aware of the charge, and given reasonable time to prepare and be heard in defence; an opportunity to cross examine employer's witness (he accuses) and in the context of the act, the right to be assisted at the hearing by a union representative or a*

friend what is important is not an application of the code in the checklist fashion, rather to ensure the process used to adhere to basics of fair hearing in the Labour Court depending on the circumstances of the parties, so as to ensure the act to terminate is not reached arbitrarily"

The applicant denied the respondent with his right to a fair hearing since the respondent was not afforded with that right. Natural justice is a cardinal principle which is entrenched as a fundamental right and includes the right to be heard amongst the attributes of equality before the law in terms of Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977 (the Constitution). In this regard, the Court has in a plethora of decisions emphasised that the courts should not decide on a matter affecting the rights of the parties without giving them an opportunity to express their views or else that would be a contravention of the Constitution and the decision would be rendered void and of no effect. See - **TRANSPORT EQUIPMENT VS DEVRAM VALAMBHIA** [1998] TLR 89, **KAPAPA KUMPINDI VS THE PLANT MANAGER TANZANIA, MBEYA RUKWA AUTOPARTS AND TRANSPORT LIMITED VS JESTINA MWAKYOMA** [2003] T.L.R 253, and at page 36 **VIP ENGINEERING AND MARKETTING LIMITED AND OTHERS VS**

CITI BANK TANZANIA LIMITED, Consolidated Civil References No. 5, 6,7 and 8 of 2008, **SAMSON NGWALIDA VS THE COMMISSIONER GENERAL OF TANZANIA REVENUE AUTHORITY**, Civil Appeal No. 86 of 2008; **R. S. A. LIMITED VS HANSPAUL AUTOMECHS LIMITED AND ANOTHER,** Civil Appeal No. 179 of 2016 and **CHRISTIAN MAKONDORO VS THE INSPECTOR GENERAL OF POLICE AND ANOTHER**, Civil Appeal No. 40, **NORTH MARA GOLD MINE LIMITED VERSUS ISAAC SULTAN**, Civil Appeal No. 458 of 2020 (all unreported). In the case of **ABBAS SHERALLY & ANOTHER VS. ABDUL S.H.M. FAZALBOY**, Civil Application No. 33 of 2002 (unreported) it was observed that:

> *"The right to be heard before adverse action or decision is taken against such a party has been stated and emphasised by court in numerous decisions. That right is so basic that a decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice".*

Thus, the applicant's action of terminating the respondent's employment even if it remained one month, had to strictly comply with the procedural requirements of employment termination or hold up until expiration of that contractual period. Short of that the respondent was justified to lodge the complaint at the CMA for unlawful termination and

that the CMA ruled rightly that the respondent's termination was unlawfully terminated on procedural grounds.

Regarding the relief of the parties, it is clearly divulged from exhibit D2 that, upon his termination, the respondent was not afforded with any benefits, the termination letter is silent to that effect. However, I have keenly paid attention to the D2 exhibit in which the applicant paid the respondent a total of 900,000/= along with the letter of termination dated 26th November 2020 and that through this payment, the applicant is considered as having discharged her obligation on the terminal benefits with the respondent. Unfortunately, it is not clear whether the said payment is one-month salary in lieu of notice, leave payment, bus fare to his place of domicile, bonus, gift or what. In my considered view, such payment is of no any legal effect in his termination package unless it was expressly stated so.

However, during the trial, Mr. Ramadhani Juma Bunyesi, deputy Manager of the applicant testified that;

> *"Following termination, the complainant was paid three months' salaries being of November and December ,2020 salaries and notice pay".*

To me, that is unsupported. The payment ought to have explicitly expressive as cover what.

The CMA ruled in the respondent's favour, awarded him: compensation of equal to 12 months' remuneration, severance pay to the tune of Tshs 161,500/=, leave pay Tshs 300,000/=. Therefore, the respondent was awarded Tshs 4,061,000/=

The applicant's counsel, has complained that, it was not correct for the CMA to order payment of compensation for 12 months' remuneration taking into consideration that the respondent had remained with one month for his employment contract to lapse. Therefore, the order has prejudiced the applicant. He also complained that the applicant had paid the respondent three months' salaries being one month's payment in lieu of the notice which was required to be served to the respondent and two months' salaries being of November and December 2020.

It is true that the employment contract between the parties started on 1st January 2020 and was to come to an end on 31st December 2020. And according to CMA's record and the evidence thereof, it is undisputed that the respondent was terminated on 26th November 2020, one month prior to his employment contract came to an end.

The question comes in mind is that, was it proper for the applicant to be compelled to pay the respondent 12 months' salaries as per law?

Section 40(1)(a) –(c) of the Employment and Labour Relation Act, Cap 366 R:E 2019 provides that;

> *"Where an arbitrator or Labour Court finds a termination is unfair, the arbitrator or Court may order the employer –*
>
> *(a) to reinstate the employee from the date the employee was terminated without loss of remuneration during the period that the employee was absent from work due to the unfair termination; or*
>
> *(b) to re-engage the employee on any terms that the arbitrator or Court may decide; or*
>
> *(c) to pay compensation to the employee of not less than twelve months' remuneration"*

From the extract of the provision of the law, it is clear that, the arbitrator or labour court when finds that there is unfair termination then has to opt from the check list of the reliefs enshrined under section 40.

Considering the fact that the respondent was terminated almost on the last month of his employment contract, the two options of reinstatement or re-engagement to accomplish the remaining part of the contract pursuant to para (a) of section 40(1) of The ELRA (supra) was

not applicable in the circumstances of this case as the CMA's verdict was issued four months after the termination and thus the life span of their contract had already expired. There was nothing to reinstate. That option was best suiting where it involved a contract of unspecified time. Thus, the third option as done, was the best remedy in the circumstance of this case.

By the way, the legal requirement to pay compensation to the employee of not less than twelve months' remuneration is not equal to salary earning but a punishment to the employer for unlawful termination and nothing more. The rationale is simple; an employee's contract should not be arbitrarily terminated just at the whim of the employer but as per law.

In the current matter, what was an impediment by the applicant to charge the respondent as per applicant's disciplinary machinery to deal with the dispute in relation to the respondent's contract upon being held responsible of causing damage to the applicant's vehicle after the said accident. Any choice has consequences. As he defaulted compliance to the law and procedure, the termination was both procedurally and substantially unlawful. On that fact, the Hon. Arbitrator was correct in reaching that finding.

With regards to other reliefs awarded by the CMA, which are severance pay, annual leave, I have found it prudent also to refer section 42(2) of the ELRA (supra) the provides that;

> *"An employer shall pay severance pay on termination of employment if – (a) the employee has completed 12 months continuous service with an employer"*

It was provided that the respondent had one-year employment contract which started on 1st January 2020 and was to lapse on 31st December 2020. The said contract was terminated on 26 November 2020 before its expiration.

The law requires that an employee has to be paid severance pay if such employee had only worked with the employer for 12 months consecutively.

In our case at hand, the respondent had not worked with the employer (the applicant) for 12 months consecutively. Therefore, the respondent is not entitled for severance pay. Paying him, is equal to post – consideration.

On the issue of leave payment, section 30 (1)(b) (i) (ii) of ELRA defines leaves cycle to mean

" in respect of annual leave, a period of 12 months consecutive employment with an employer following

(a)subject to subsection (2), an employee's commencement of employment; or

(b) the completion of the last 12 months leave cycle, in respect of all other forms of leave conferred under this Sub Part, a period of 36 months' consecutive employment with an employer following-

(a) subject to subsection (2), an employee's commencement of employment; or

(b) the completion of the last 36 months leave cycle".

Section 44(1)(b) of the ELRA provides that an employee found on unfair termination is entitled for payment of annual leave pursuant to the requirement provided under section 31 of the Act.

It is now settled that a person eligible for payment of annual leave is an employee who has worked with the employer for 12 months consecutively. See section 30 of the Act, and for the other leave an employee had to work with employer for 36 months.

In the case at hand the respondent had worked with the employer for about 11 moths. And therefore, is not entitled for payment of annual leave.

With the all above observations, the award of the CMA is reversed to the extent of payment of severance pay and annual leave. The rest of the orders are hereby upheld by this Court for being rightly reached. The application is partly granted.

No orders as to costs

It so ordered.

DATED at SHINYANGA this 12th day of September, 2023.

F.H. MAHIMBALI

JUDGE