IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT MWANZA

LABOUR REVISION NO. 26 OF 2022

(Originating from Labour Application No. CMA/MZA/NYAM/195/2020/53/2020 Mwanza)

BETWEEN

GODWIN RWEGOSHORA..... APPLICANT

AND

MANTRACT TANZANIA LTD..... RESPONDENT

JUDGMENT

16th September & 08th November, 2023.

ITEMBA, J.

On 4/11/2012, the applicant Godwin Rwegoshora, secured an employment at the respondent Mantrac Tanzania Ltd. as a warehouse clerk. A few years later, on 23/12/2019, the applicant was issued with a termination letter on grounds of absenteeism from work for more than five days. The applicant referred his complaints to the Commission for Mediation and Arbitration (CMA) stating that he was absent from work because he was undergoing medical treatment and his employer was aware. Nevertheless, the CMA issued an award in favour of the respondent.

Aggrieved by the Award of the CMA delivered on 21st February 2022, the applicant filed the present application under the provisions of sections

91(1)(a)(b), 91(2)(b), of the Employment and Labour Relations Act [Cap 366 RE 2019] (herein to be referred as the Act) and Rule 24(1),(2) and (3) and 28(1)(c) of the Labour Court Rules, GN No.106 of 2007 (herein to be referred as the GN No. 106 of 2007). The Applicant prayed before this court for the following orders:

i. *That the Court be pleased to revise and set aside the Arbitration Award issued by the Commission for Mediation and Arbitration at Mwanza in Dispute No. CMA/MWA/NYAM/195/2020/53/2020 dated on 21st February 2022.*
ii. *That this court nullified the proceedings and set aside the orders by the trial tribunal and orders the matter to be tried afresh.*
iii. *Any other order that the court may deem just to grant under the circumstances of this application.*

In the applicant's affidavit, at paragraphs 4 (i) to (iv) of the affidavit, he advanced the following legal issues for consideration: -

i. *That the CMA misdirected for holding that there were valid reasons for termination of the applicant's employment by the respondent.*
ii. *That the CMA misdirected itself and failed to evaluate the evidence on record which was contradictory.*
iii. *That the CMA award was based on extraneous matters which were not part of the case.*
iv. *That the CMA misdirected both in facts and law for failure to consider that the decision terminating the applicant from employment and the evidence adduced was contradictory.*

At the hearing, the applicant afforded the service of Mwita Emanuel and Rafael Gilbert and the respondent had the service of Fratern Munale all learned counsel.

Mr. Mwita was the first to submit, he chose to consolidate the grounds for application and prays for the applicant's affidavit to be adopted. He went on that, the offence was the absenteeism of the applicant between 30.09.2019 to 10.10.2019 and the applicant was served with a letter for disciplinary hearing. He claims that the records do not show if there was a preliminary procedure before the applicant was called to the disciplinary committee. Referring to Regulation 13(1) of GN. 42 of 2007 the employee was supposed to conduct investigation. He went on that, the applicant was attending medical treatment and was permitted by the respondent who also paid for it therefore, had the investigation been conducted, it would have revealed the reasons for the applicant's absenteeism.

He went on that, the procedure for disciplinary hearing was tainted with irregularities for the reasons that, when the respondent was contacting the applicant, she used the address based on the applicant's place of recruitment while at the time he was living at the north Mara and attended medications at Mwanza and Dar es Salaam.

The learned counsel went on that, the applicant was denied his right to be heard for it is alleged that, the notice of hearing was given to him

physically but there is no proof from the officer of the respondent. That, a quorum was not proper in the disciplinary hearing, he referred to Rule 1 of GN No.42 that the form did not describe the description of parties.

He also claims that the CMA award relied on extraneous matters whereas the burden of proof was wrongly shifted to the applicant. He insisted that, reasons for absenteeism were known because it was undisputed that the applicant was absent, rather, the issue was whether on the disputed days the applicant was still sick.

He also submitted on the issue of illegality of the procedure to the extent that all the annexures tendered before CMA were not read which is contrary to the legal requirement.

In the alternative to what he stated above, Mr. Mwita insisted that even though the applicant was served with a notice, he should also be served with the investigative report failure to that, deny the applicant the right to be heard. He refers to the provision of Rule 13(2) of GN No.42 of 2007.

Adding to Mr. Mwita submissions, Mr. Rafael learned advocate argued on the compliance of Rule 13(2) of GN. No. 42 of 2007, he insisted that the procedure for the termination of the applicant was not adhered to. That, the cited legal provision requires the employer to notify the employee of his allegations on the form and language known to the employee which was not done. Referring to page 16 of the proceedings

by the CMA, it was revealed by PW1 that there was no charge sheet. He also referred to page 3 which shows that there was no charge sheet which would allow the employee to know and respond to his allegations. He therefore prays the application to be allowed.

Responding, Mr. Fratern for the respondent objected the application praying the counter affidavit by Clara Lusumbila and notice of opposition to be adopted and form part of the application.

On the proof of compliance with the preliminaries before the disciplinary committee, he referred to the evidence of Anthon Zimulinda (DW2) who insisted that he sent a letter (exhibit D3) to the applicant who denied to receive it. He went on that Clara Lusibamajila who testified as (D1) explained the steps she took before the disciplinary hearing including tracing the applicant through his mobile phone and a person was sent to the applicant with a letter which he rejected as shown on page 12 and 13 of the proceedings.

He also disputed the issue of investigation on the reason that the rule relied on does not explain what investigation entails. He insisted that in the circumstances where there is absenteeism, there is no need to have a physical investigation as per rule 13(ii) of GN. No. 42 of 2007. He insisted that there were witnesses who showed that investigation was done. He further objected on the issue that the notice was not served. He referred to the evidence of DW1 who tendered a notice of disciplinary

hearing which was attached with receipt of service. On the issue of using a proper address, he avers that the address used was the one given to the respondent by the applicant himself and that it was the duty of the applicant to inform the respondent on the change of address.

He went on that, DW5 and 6 collectively showed that the applicant wrote a letter to the employer using the post address of **240 Mwanza** and the employer used the same address to inform the applicant of the disciplinary hearing on 17.12 and the applicant did not show up. He insisted that the applicant's complaints are baseless because Rule 13(6) allows the meetings to proceed when the employee does not attend. Reacting on the requirement of notice of allegations, he insisted that it is baseless because the respondent tendered a notice of disciplinary hearing (DW4) which describes the charges in 2 languages that was in Swahili and in English and the complaints were the absenteeism of the employee from his employment from 30.12.2019 to 12.10.2019. That, when D1 was re-examined before the CMA he stated that the notice was incorporated with the allegations.

On the issue that the employer was aware of the applicant's absenteeism for he took care of his medical bill, he avers that the disciplinary hearing was conducted for the employer not knowing the whereabouts of the applicant and the only complaints were on absenteeism.

He also referred to Sections 110 (1) and 113 of the Evidence Act Cap.6 RE: 2019, which provides for the burden of proof and Section 137 of ELRA which gives the employer a duty to prove that the termination was fair. He therefore insisted that both the reasons and procedure for termination were proved. He insisted that the nature of the offence was misconduct and based on the Code of Good Conduct, absenteeism is a good ground for termination. To support his argument, he cited the case of **Ali Farahani vs Geita Gold Mining Ltd**, Civil Appeal No. 54 of 2020. On the issue of the particulars and descriptions of the members of the disciplinary meeting, he insisted that the minutes (DW7) show who were in the disciplinary meeting. He added that rule 13 does not require description and even in its absence, it is not a material irregularity.

On the award be cited with extraneous matter, he avers that the award had three issues and the issue of absenteeism was one of them. On the claim that annexures were not read, he objected on the reasons that dialogues at CMA were on details of the said exhibit. Referring to page 14 of the proceedings, he insisted that witnesses were asked questions and referred to the exhibits.

He went on that, some of the issues were not in the affidavit and therefore a person cannot complain over the issues which were not pleaded. He supports his arguments referring to the case of **Zuberi Athumani Mbuguni vs National Bank of Commerce Civil**

Application No. 311/12 of 2020. He also referred the case of this court in **Robert Mapesi vs TRR** Revision No. 813 /2018 and **Fortunatus Clavery Majani vs AE Security Limited Revision No. 109 of 2019** that the employer has a duty to prove the valid reasons for termination and adhered to the procedures required but the employee has to account for the days of his absenteeism. He therefore prays the application to be dismissed and the CMA decision to be upheld.

Rejoining, the applicant learned counsel insisted that they challenged both the procedure and substantive issues. He referred to paragraph 4 of the affidavit which speaks of serious illegality. He insisted that, the procedure for service and admissibility of documents were not properly admitted. Referring to page 13 of the proceedings, he avers that exhibit DW3 and DW4 which were important documents were not properly before the CMA.

He went on stating that for the reason that one Anthon Zimulinda knows the residence of the applicant, it was not proper to send the letter to Bukoba for the address was only for reference. He also avers that the issues were not whether there was absenteeism rather, it was whether the said absenteeism should lead to termination and whether the applicant was made aware of the procedure. Adding on the issue of the particulars of the members of the disciplinary meeting, he avers that some

of the members are not known and it becomes impossible to tell if they had a conflict of interest.

I have considered the submissions of both parties, the CMA award and the records. The applicant faults the award by the trial Arbitrator on allegations that she failed to properly evaluate the evidence before her and thus found the termination both procedurally and substantively fair. In resolving the contention in this application, I will address the main question as to whether the termination was fair procedurally and substantively.

It is well provided for under section 37(2) of the Employment and Labour Relation Act and Rule 8(1) of the Code of Conduct and Good Practice Rules; For termination to be considered fair, it must be done for a valid reason and the procedures must have been followed. See also **Stanbic Bank Tanzania Ltd. vs. Peter Aloyce** (Revision Application No. 4 of 2020) [2020] TZHC 3432 and in **Director General, Regional Manager vs. Machumu Mkama** Revision No. 38 of 2014 HC. It is also settled that it is the duty of the employer to prove that the termination was done fairly as stated under section 39 of ELRA, that: -

> *39. In any proceedings concerning unfair termination of an employee by an employer, the employer shall prove that the termination is fair.*

The law is also clear that absenteeism is one of the misconducts that warrant termination of an employee from his employment. The position is provided for under paragraph 9(1) of the Guidelines for Disciplinary Incapacity and Incompatibility Policy and Procedures found in the Code of Conduct and Good Practice Rules, which states: -

> *"Absence from work without permission or without acceptable reason for more than five working days"*

As stated in the decision of this court in **JC Gear Expo-com Ab (T) Ltd. vs. Jumbe Karala and Another** (Labour Revision No. 4 of 2019) [2021] TZHC 5377 where this court substantiated necessary elements of the offence of absenteeism. It was stated that: -

> *"However, for the same to be the ground of termination, it must firstly be established, that the employee actually absented himself from the workplace, secondly that he gave no acceptable reasons for his absence, thirdly, that after establishing absenteeism as the ground of termination, the termination must be in accordance with the procedures, which starts by serving the employee the charge sheet through his known address or residence, containing the accusation of absenteeism."*

Going to the merit of this application, there is no dispute that the applicant was absent from the workplace from 30th September to 10th October 2019 which is 11 days and hence more than five consecutive days. According to the records, the applicant claims that he was attending

medication which the respondent was aware. Further perusal of the records reveals that the applicant attended medications at the Muhimbili National Hospital and on 10.09.2018 he was given a medical report that he was to attend Clinic at Bugando Hospital in Mwanza for three months. Counting three months from 10/9/2018 the clinic would have ended in December 2018. The report was not disputed by the respondent for the reason that the substance of the charges of absenteeism were from 30.09.2019 to 10.10.2019 and it has no correlation with the period alleged by the applicant that the employer was aware. The applicant did not exhibit before the CMA that he informed the respondent of his absence from work and that he was attending medication at Bugando Hospital for he has a duty to prove that he was never absent or his absenteeism was a result of due cause. The applicant had to account for all 11 days of his absenteeism by showing a permit or approval by the respondent. Based on the prevailing circumstances, it is my finding that CMA was justified to align with the respondent's disciplinary committee that the applicant was absent from work against the rules and it was right to terminate his employment. In that regard, it is settled that the respondent had a valid reason and was justified to terminate the applicant's employment.

On the second limb of procedural compliance, the applicant's learned counsel argues that the procedures were not adhered. He claims that, the disciplinary committee acted contrary to rule 13 of GN No. 42 of

2007 for the reasons that, the preliminary procedures were not adhered to including that no investigation was conducted and at the disciplinary hearing, there is no proof that the applicant was served with notice and that documents were not read.

As it required under Rule 13 (2) of Page 18 of 21 of the Employment and Labour Relations (Code of Good Conduct) Rules, 2007, Government Notice No. 42 of 2007, that commencement of the charge against a person who faces a disciplinary hearing must be initiated with a proper charge. The applicant claims that he was not served therefore he was not properly charged. His allegations were rebutted by the respondent's learned counsel. Going to the records, it appears that the respondent wrote a letter requiring the applicant to give reasons for being absent from work from 30th September 2019 without permission from the manager. The letter also informed the applicant that, he was required to respond within 72 hours or else the matter should be taken to disciplinary committee. This attempt was after the respondent had sent one Anthon Zimulinda to the applicant who testified that the applicant refused to receive the letter. The applicant could not reply to the letter (Exhibit D3) and the respondent decided to refer the matter to the disciplinary committee and served the applicant with a notice of disciplinary hearing (Exhibit D4) with a receipt which is a proof of service and the applicant

never replied. On 13.12.2019, the respondent convened a disciplinary hearing which found the applicant guilty of absenteeism.

As it appears on records, the respondent complied with the requirement of rule 13 of the Employment and Labour Relations (Code of Good Conduct) Rules, 2007, Government Notice No. 42 of 2007 on determining the disciplinary charges against the applicant. The allegation that the postal address was not of the applicant is baseless for the address was given to the respondent by the applicant and the applicant had a duty to inform the respondent of any changes he made on his personal particulars including the address.

On the issue of the legality of the documents raised by the applicant's learned counsel, I find it not justified for the reasons that, documents before the CMA were filed and served to both parties which parties had time to go through and not to be taken by surprise during the hearing. This being a civil case, the standard of proof is on the balance of probability and not proof beyond reasonable doubt. Further, parties got to see the potential exhibits in advance and even during the hearing the applicant's counsel did cross-examine in respect of those exhibits. Therefore, failure to read the exhibits after their admission did not occasion injustice to either of the parties. Based on what is stated above and with reference to the valid procedures, I find that the applicant was

properly charged and for that reason, I see nothing to fault the decision of the CMA.

On the issue of the award, it is clear that the CMA gave reasons for the decision reached in the award that the applicant was absent without notice to the respondent for more than five days, which I find justified and I have no reason to alter.

In the circumstance, this revision application fails. The decision and orders of the CMA remain undisturbed. Based on the fact that this is a labour case, I give no order as to costs.

It is so ordered.

DATED at **MWANZA** this **8th** of November, 2023.

L. J. ITEMBA

JUDGE.

Ruling delivered this 8th day of November, 2023 under my hand and seal of the court via audio conference, in the presence of Messrs. Marwa Samwel and Fratern Munale learned counsels for the applicant and respondent respectively and Ms. Glady Mnjari, RMA.

L.J. ITEMBA

JUDGE