IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(KIGOMA SUB – REGISTRY)

AT KIGOMA

LABOUR REVISION NO. 2 OF 2023

SENTARO THOMAS PAUL..... APPLICANT

VERSUS

THE REGISTERED TRUSTEES OF THE DIOCESE OF WESTERN TANGANYIKA (THE ANGLICAN CHURCH OF TANZANIA).....1st RESPONDENT

DIOCESE OF WESTERN TANGANYIKA,

ANGLICAN CHURCH KRISTO MFALME) .....2nd RESPONDENT

(Arising from the Commission for Mediation and Arbitration of Kigoma at Kigoma)

(Migire, Arbitrator)

dated 31st day of March 2023

in

CMA/KGM/4/2022/01/2022

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JUDGMENT

05th December 2023 & 07th February 2024

Rwizile, J

The applicant was an employee of the Diocese of Western Tanganyika as a security guard. He was terminated from employment due to misconduct. Not satisfied by his termination, he referred his matter to the Commission for mediation and arbitration (CMA), where he was not successful. His

application was therefore dismissed for not being meritorious. He was aggrieved by the decision of the CMA, and has now filed this application claiming the following reliefs; -

i. This honourable Court be pleased to call for the record of the commission for mediation and arbitration for Kigoma in labour dispute No. CMA/KGM/4/2022/1/2022 and satisfy itself as to the correctness, legality, and propriety of the proceedings and the awards therein.
ii. This honourable Court be pleased to quash and set aside the proceedings and award of the commission for mediation and arbitration for Kigoma in labour dispute No. CMA/KGM/4/2022/1/2022.
iii. Costs be provided for.
iv. Any other Order deemed fit to grant.

For determination, the applicant advanced five grounds as hereunder;

i. That the award for commission for mediation and arbitration was improper as the commission failed to determine and consider the unfair procedure of termination made by the respondent (Employer) as he was never heard by the employer and notice has never been given to him and other local remedies never been exhausted.
ii. The award by the commission for mediation and arbitration was improperly procured for failure to properly evaluate the evidence brought in favour of the applicant.
iii. The award by the commission for mediation and arbitration was improperly procured for failure to evaluate legal procedures

followed by the employer in his termination and legal remedies for unfair termination.

iv. That the Commission for Mediation and Arbitration for Kigoma unlawfully delivered a decision based on weak evidence from the respondents.

The application was heard by written submissions. The applicant was present unrepresented, while the respondents were under the services of Mr. Mwangati, a learned advocate.

The applicant argued grounds 1 and 3 together. It was his submission that he was not heard by his employer before his termination. He added that even the evidence at the CMA does not reveal that the applicant was heard before he was terminated from employment. To strengthen his argument, he cited the principle of nature justice and its consequences as referred to in the case of **Abbas Sherally Mehrunissa Abbas Sherally vs. Abdul Sultan Haji Mohamed Fazalboy**, civil application No. 133 of 2002, Court of Appeal.

The applicant also submitted about the procedures for termination, where he argued that the procedures for termination were not followed including the disciplinary punishment. He added that he was not warned on such misconduct and he was not consulted before termination.

The applicant further submitted together grounds 2 and 4. He argued that the decision of the administrator was not backed by evidence on record vis a vis the weight of the evidence of the respondent. He submitted that no evidence proved that the applicant committed an offence alleged before termination.

According to him, no one saw him when the offence was committed. It was his submission that he was not given sufficient notice to prepare for a disciplinary hearing. It was added that no investigation was conducted. To support his submission on preliminary investigation, he cited the case of The **Generai Manager Williamson Diamonds Ltd Mwadui vs Edwin Yustas Magelegele**, Civil Appeal No 8 of 1999, CAT, and the case of **Kitundu Sisal Estate vs Shingo and Others**, (1970) E.A 555. The applicant also cited the case of **Sodetra (SPRL) LTD vs Njelu Mezza and another**, High Court labour division, in Revision No. 207 of 2008. Submitting about compensation, it was his view that if proved that there was unfair termination, a judge or arbitrator is required to award compensation of not less than 12 months of remuneration. He finally made a prayer that the decision of the CMA be quashed and compensation should be awarded.

Opposing this application, the respondent submitted as follows; starting with the first ground, that; the applicant was heard. He was told by his employer to explain why disciplinary action should not be taken against him due to the loss of items that occurred. The applicant, it was his argument, that he admitted to his employer by writing a letter which was exhibit A5.

Citing rule 12 (1) of the Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007, it was his submission that a judge or arbitrator in deciding whether there was fair termination or not, rule or standard regulating the conduct relating to the employment should be put into consideration. Compared to the applicant, it was submitted that the applicant was involved in a series of misconduct that contravened all the

standards regulating the conduct relating to the employment, and the same was not tolerated by his employer.

Though not submitted by the applicant, rule 22(2) of the Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007 was cited by the respondents instead of Rule 12(2) (supra). It was argued that the first offence shall not justify termination unless it is a serious offence to the extent that his presence at work is intolerable, and one of the acts as stipulated under rule 12(3) (supra) which is wilfully endangering the safety of the others. And it was submitted that the misconduct of the applicant is not the first offence.

Misconduct, it was argued, includes abusive behaviour, assaults, threatening to other employees, being under the influence of alcohol or drugs, and consuming alcohol while on duty. It was added that the applicant admitted all the offences in writing. Therefore, the right to be heard was accorded.

On the second ground, as submitted by the applicant his evidence was not evaluated by the arbitrator. Contrary, as it was submitted by the respondents, the same was evaluated. The witnesses of the respondents all testified to prove the gross misconduct committed by the applicant. Meanwhile, the applicant was the sole witness, who admitted to being given keys which opened the store where the items were stolen and he admitted the allegation.

On rejoinder, it was reiterated that the applicant was not heard. The applicant was forced to admit the offence in writing but the matter was not taken to the police station as required by law.

Having gone through the submissions, it is important to venture into whether termination was fair or unfair and whether the evidence at CMA was evaluated. Passing through the records of CMA, the applicant claims unfair termination, he alleged being terminated from his employment as a security guard without being given the right to be heard.

The concept of unfair termination is enshrined under section 37 (2) (c) of the Employment and Labour Relations Act, 2019 [CAP 366 RE 2019], which provides that termination will be termed as unfair if the employer fails to attest that the employment was terminated under a fair procedure as prescribed by law.

The procedures for fair termination of employment are covered under Rule 13 of the Employment and Labour Relation (Code of Good Practice) Rules, GN 42 of 2007; subsection (1) of the rule provides that;

> *"The employer shall conduct an investigation to ascertain whether there are grounds for a hearing to be held."*

The above subsection is the legal requirement of which an employer should adhere to. It is where an employer is required to investigate by collecting evidence that will ascertain whether there are sufficient grounds to charge the employee. The process is finalized by conducting a disciplinary hearing.

Thereafter, after the employee is required to be notified of the allegations, he would be prepared for the hearing, the same is chaired by the senior management representative. After all procedures are resorted, rule 13 (5) of the Employment and Labour Relation (Code of Good Practice) Rules, GN 42 of 2007 must be complied. The same provides that;

"Evidence in support of the allegation 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 a witness if necessary."

This is the stage of the hearing, where the employee is faced with a charge. The employer shall support his case with evidence supporting the charge with witnesses if any. The employee should be given time to respond. At the end, the committee will come out with the findings, and the reason for those for that finding. The employee will be given a chance to mitigate in case found guilty. Finally, the committee will issue its verdict in terms of punishment.

In the case at hand, the procedures articulated under Rule 13 of, GN 42 of 2007 were not complied. I arrived at such a conclusion after passing through the records of the CMA. There is nowhere showing that the applicant was summoned before the disciplinary committee and the charge against him was read and was given a chance to reply there too. What is seen are the allegations concerning the applicant's misconduct against his co-workers and other unpleasant behavior towards others at the workplace. There is no reliable evidence to show that the disciplinary committee was formed and held the meeting against the applicant.

Let it be remembered that, a right to be heard is one of the principles of natural justice which once broken, the decision that follows is fatal. See **Abbas Sherally Mehrunissa Abbas Sherally vs Sultan Haji Mohamed Fazalboy** (supra),

Considering the evidence of Dw2 that they have sat in many meetings to warn the applicant, his evidence which was strongly disputed by the applicant was not echoed in the minutes of the disciplinary committee. Apart from that there is no evidence showing that the applicant was given the charge to prepare his defence. It seems there is a letter that was tendered by the employer at CMA and admitted as exhibit A5, the content of its, reflection is as hereunder;

> *"Mimi mtajwa hapo juu ni mlinzi wa DWT. Tarehe 5-2-2022 siku ya Jumamosi saa 12:15 jioni mafundi umeme walinipa ufunguo nipeleke kwa mchungaji. Leo tarehe 7-12-2022 saa 10:09 asubuhi nimeambiwa kuwa mimi na mafundi tulipe kila mmoja shilingi 104,000/= laki moja na elfu nne. Tumekuwa na maelewano hayo."*

The above letter was used by CMA to conclude that the applicant was heard. It is shown on page 4 of the judgment, I quote;

> *"Kuhusu kupotea kwa waya yeye mwenyewe (PW1) aliandika barua tarehe 7/2/2022 akisema wameeelewana na mafundi walipe gharama za waya (Tsh. 312,000/=) ambapo kila mmoja atalipa Tsh. 104,000/= Mbele ya tume hii anasema eti hajasilikilzwa. Hiyo sio kweli. Ni wazi Kwamba alisikilizwa, wakajadiliana na kukubaliana kulipa waya huyo..."*

The above was termed as a right to be heard given to the applicant to the extent that he agreed to repay the lost items. The same was not accompanied by minutes which show their discussion until they concluded. To me, this cannot be termed as a hearing to decide whether to terminate the employment of the applicant or not. It was to pay for the lost items. This evidence could be used during the disciplinary hearing

that the applicant accepted to pay for the lost items. It was thus, admitted to being involved in such misconduct, hence subject to termination from employment.

At the trial before CMA, the only minutes which was tendered as the exhibit was a meeting of the security guards including the applicant, it was exhibit A1. Among the agenda, No. 4 was titled, "migogoro kazini", it had a subheading in respect of the applicant being absent from work without permission and having a bad relationship with his co-workers to the extent that he promised to kill one of his colleagues and threw him along the road. In such a meeting there is nowhere the applicant was given time to respond to such an allegation. It could be a normal meeting to discuss their daily issues concerning their work, and not for the applicant to respond to the allegations against him.

From the above, I found no reason to disbelieve the submission of the applicant that he was heard before his termination. Therefore, the applicant was condemned without being heard which amounts to a violation of rule 13 of the Code of Good Practice, (supra) and article 7 of the Termination of Employment Convention (ILO) No. 158 of 1984 provides for the fair procedure before the termination of an employee, it provides that;-

> *"The employment of a worker shall not be terminated for reasons related to the worker's conduct or performance before he is provided an opportunity to defend himself against the allegations made unless the employer cannot reasonably be expected to provide this opportunity."*

Having said so, the arbitrator's decision that the applicant's termination was fair, is hereby quashed as it is unjustifiable under the law. I think the employer did not follow the termination procedures even though there was an offence committed. Therefore, the applicant is entitled to at least 6 months compensation as long as the termination is declared on unfair procedures. The application succeeds to the extent as stated above.

ACK Rwizile

JUDGE

07.02.2024