IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

SHINYANGA SUB REGISTRY

AT SHINYANGA

LABOUR REVISION NO. 20231222000028224

(Arising from REF NO.CMA/SHY/50/2017)

WILKISTER AKOTH ONG'ONDO .....APPLICANT

VERSUS

RICH RICE ENGLISH MEDIUM PRIMARY SCHOOL ..... RESPONDENT

JUDGMENT

22nd April & 10th May 2024

F.H. MAHIMBALI, J

The applicant herein was an employee to the respondent serving as a teacher. She was later terminated from her employment for the count of absenteeism. Aggrieved by such decision she preferred the matter before the CMA for unfair termination of her employment and craved for notice pay, leave pay, salary for January and February, 12 months remuneration as compensation for unfair termination, repatriation to Geita and daily subsistence allowance, the proposition which was opposed by the respondent who maintained that the applicant had left the service after had been approached by immigration office and on account of being absent for several months and thus they were forced to do replacement.

The CMA after a full consideration, awarded the applicant annual leave payment (one month salary), and leave allowances (one month salary) to be paid within 14 days and rejected claims on repatriation and subsistence allowances.

The applicant was unhappy with the award she has then approached this Court for revision of the CMA award.

During the hearing of this matter, the applicant appeared in person and unrepresented while the respondent had legal representation of Mr. Frank Samwel learned advocate.

The applicant submitted that she was aggrieved by the decision by the CMA's award. She however contemplated that she was terminated unlawfully, there was a procedural error in her termination. She thus prayed that this Court to adopt her affidavit in support of the application. Furthermore, she prayed her application be allowed as prayed.

Mr. Frank Samuel opposed the application. He fortified that the CMA's award was justifiable. Also added that, the applicant had self terminated her employment as per evidence in record. This is due to the fact that she was alleged to be a foreigner - Kenyan. She was detained by Immigration. On her release, she was directed that as she had no work

permit, she was not eligible for working in Tanzania unless she obtained it or established that she was a Tanzanian. So, it took her a long time to do anything. That was in October 2016. Until Jan 2017, she hadn't supplied any credential to that effect. In her own testimony before CMA, she supplied none of the documents authorising her to work in Tanzania. Failure of which, the respondent had no any other option but decided to employ another teacher in her place. At page 4 of the CMA's award, the issue of Immigration features out very well. So, as she failed to supply the said document authorising her work in Tanzania, she absconded job herself. Thus, the CMA's award is justifiable. He thus pressed for it be upheld by this Court.

In rejoinder the applicant contended that the issue before the CMA was not an immigration i.e unlawful presence in Tanzania but unlawful termination. So, what is supposed to be established here is whether there was lawful termination of her employment and not an immigration issue. As she was verbally terminated, she had no opportunity to know what were her mistakes/offences that warranted her dismissal. She was supposed to be charged and formerly terminated her employment. In the absence of compliance to mandatory legal requirements, that's why she

claims that her termination by the employer was unlawful. She thus prayed for her application to be allowed.

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

However, it is trite law that the employer having contemporary issue for termination of employment contract then ought to abide to the rules and procedures for termination. See the case of **Felician Rutwaza v. World Vision Tanzania, Civil Appeal No. 213 of 2019 (unreported),**

In the instant application, it is alleged that following the applicant being implicated by immigration department for being not a Tanzanian citizen she absconded from the service, thus she was absent for about three months. Since the respondent was in need of her services to proceed, hired another teaching staff for replacement of the applicant's vacancy. In due cause they purported to terminate her employment fairly as she was no where to be seen for her to be accorded other rights for that period. Similarly, the respondent issued letter for termination and refuted the fallacy that they terminated her verbally.

It is the principle of law that one who alleges must prove. I have gone through the testimony of both sides and upon perusing the trial records, vividly there is no supportive evidence to prove that the applicant was verbally terminated rather by letter dated on 17 January 2017 the day which is not disputed by the applicant being terminated. In reference

to Guideline 9 of GN. No. 42 of 2007(supra) provides that absenteeism for 5 days is sufficient for termination of employment.

Basing on the testimony of the respondent of which was not strongly resisted by the applicant, on glance, it may be concluded that termination of the applicant was substantively fair.

On procedural aspect of fairness of termination, the records are silent as to whether there were efforts made by the respondent in due cause of termination of the applicant's employment. The respondent's evidence provides that after the applicant had been implicated by immigration issues, she absconded from the service for long time about three months. The testimony also tells that due to absenteeism they then decided to terminate the applicant's employment.

The records do not speak as to whether they attempted to call the applicant before the disciplinary meeting and accord her with the opportunity to be heard as the law requires. No service of the charge was made, no notice of disciplinary hearing and that no proof as to whether disciplinary hearing was conducted and thus no minutes of the disciplinary hearing on concession that the applicant be terminated.

In upshot, I am of the view that, the respondent did not comply with the provisions of Rule 13(2), (3) (5) of GN. No. 42 of 2007(supra)

that require for the disciplinary hearing to be conducted and the parties be given right to be heard. I therefore find that termination of employment of the applicant was procedurally unfair.

Legally speaking, for termination to be fair, it must be both substantive and procedurally fair. There is no one choice of option. The consequence of it, affords no mitigation. So long as the applicant was absent from duty for the alleged immigration issue, the respondent was duty bound to initiate the formal disciplinary proceedings against the applicant before that adverse action was taken against her. As that was not done, the termination is considered to be legally unfair (See **Jimson Security Service V. Joseph Mdegela**, Civil Appeal No. 152 of 2019, CAT at Iringa).

Failure to take disciplinary action against an employee is an employer's mistake which then upon termination to unfair termination (See also **Tarcis Kakwesigaho V. North Mara Gold Ltd** [2015] 27 (MSM, Lab. Rev. No. 6/2014). It is a cardinal principle of natural justice that one should not be condemned unheard but fair procedure demands that both sides should be heard before and adverse action is taken against him/her. *Audi alteram partem* i.e hear the other party. In **Ridge v. Baldwin** (1964) AC 40, the leading English case on the subject, it was

held that a power which affects rights must be exercised judicially, i.e. fairly. It is trite law therefore that it is not a fair and judicious exercise of power, but a negation of justice, where a party is denied a hearing before its rights are taken away. As similarly stated by Lord Morris in **Furnell v. Whangarei High School Board (1973)** AC 660, "'Natural justice is but fairness writ large and judicially". See also **Mbeya-rukwa Autoparts & Transport Ltd. vs Jestina George Mwakyoma** (Civil Appeal 45 of 2001) [2001] TZCA 14 (9 August 2001). This position is clear in our many decisions, including the cases of **Charles Christopher Humphrey Kombe vs Kinondoni Municipal Council**, Civil Appeal No. 81 of 2017 and **Yazidi Kassim Mbakileki vs CRDB (1996) Ltd and Another**, Civil Reference No. 14/04 of 2018 (both unreported). The latter case quoted the of - quoted paragraph from **Abbas Sherally & Another vs Abdul S. H. M. Fazalboy**, Civil Application No. 33 of 2002 (unreported) in which it was observed that: -

> *"The right to be heard before adverse action or decision is taken against such a party has been stated and emphasized by courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified*

even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice."

It was therefore important to hear the applicant before the termination decision was reached. Perhaps, the glaring question would be: where could she be found? The answer is simple, how was that purported termination letter delivered/reached the applicant. It would be logical for the respondent to remain mute as the applicant was absent and not accessible. Then, upon her re-appearance, automatically the formal processes against her would have commenced. To opt otherwise, attracts legal consequences such as this.

What are the legal consequences for unlawful termination? The process of terminating the employment relationship by the employer does not end with the established reason and proper procedure only, but also is accompanied by other procedures or process until finalization of the relationship. Thus, compliance to in termination is an overview of the whole process that must be adhered to by the employer to terminate the employment of an employee (See section 37 (1)(2)(a)(b)(i)(ii) and (c) of the ELRA and Rule 9 of the ERL Code of Good Practice. As to consequence of failure to abide by the provisions of section 37 of the ELRA, the

consequences are provided under section 44(1) (a) –(f), (2) of the ELRA and Rule 8 of the ELR Code of Good Practice (CGP). The payments entitled to the employee upon termination of his/her employment includes: remuneration for work done before termination, annual leave pay due to an employee under section 31, any annual leave pay accrued during any incomplete leave cycle, notice, severance pay, transport allowance, certificate of service.

In the current matter, the applicant filled in her CMA F1 seeking for the following remedies: compensation, notice, salaries for the months of January and February, repatriation costs to Geita, subsistence allowance prior to her repatriation to Geita. I have closely looked at these prayers and fitted them into the facts of the case. For sure, every case must be decided on its own facts. I understand that employers do make such employment mistakes for lack of legal knowledge. Had they in place personnel with legal labour laws, I am sure would have mitigated the costs. Mindful of the legal position that the terminal benefits are mandatorily payable upon termination of any employment, in the current matter, the salaries for January and February 2017 in which the applicant had not worked for on her own absenteeism, I find no legal justification

for that payment. However, I order the following reliefs: compensation of 12 months' salary, notice of termination and repatriation costs to Geita.

For the fore going, I allow the application to the extent explained.

No order as to costs

DATED at SHINYANGA this 10th day of May 2024.

F.H. MAHIMBALI

JUDGE