IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
TABORA SUB-REGISTRY
AT TABORA
CONSOLIDATED LABOUR REVISION NO. 03 & 04 OF 2023
(Originating from the decision of the CMA for Tabora in Labour Dispute No. CMA/TAB/DISP/52/2011)

CHRISTIAN B. MINDE ..... APPLICANT
VERSUS
TANZANIA ELECTRIC SUPPLY COMPANY LIMITED ..... RESPONDENT

RULING

Date of Last Order: 04/06/2024
Date of Ruling: 12/06/2024

KADILU, J.

On 30/05/2011, the applicant filed a Labour Dispute No. CMA/TAB/DISP/52/2011 in the Commission for Mediation and Arbitration for Tabora (CMA), alleging that the respondent terminated him from the employment unfairly. He prayed for the CMA to reinstate him to employment. The respondent opposed the application. After hearing both sides, the Hon. Arbitrator found that the respondent had no valid reasons for terminating the applicant and that the procedure invoked was unfair. It ordered the respondent to pay the applicant TZS. 1,300,000/= as payment in lieu of notice, TZS. 3,500,000/= as severance pay for ten years, and TZS. 46,800,000/= as compensation for 36 months due to unfair termination.

The decision aggrieved both the applicant and the respondent. The respondent filed in this court Labour Revision No. 03 of 2023 seeking the reversal of the CMA award on the ground that the compensation awarded to the applicant was unjust and may set a detrimental precedent and paralyze its undertakings countrywide. Conversely, the applicant filed Labour Revision

No. 04 of 2023 challenging the CMA award for the reason that he was entitled to reinstatement to the employment, not compensation as ordered by the CMA. Before hearing the applications, the court consolidated them. During the hearing, the applicant was represented by Mr. Saikon Justin, the learned Counsel whereas Mr. Norbert Bedder, Mr. Samwel Mahuma, and Mr. Gureni Mapande, the learned State Attorneys represented the respondent.

Mr. Bedder submitted that the Arbitrator erred in holding that the applicant's termination from employment was substantively and procedurally unfair. He elaborated that although the applicant was acquitted in a criminal case, the said acquittal did not impair disciplinary proceedings that were ongoing to the employer. He holds such a view because the laws applicable and standards of proof in the two cases are different. The learned Counsel explained that while the criminal case against the applicant related to theft and economic crime, the disciplinary offences involved gross negligence and moral turpitude. He also faulted the finding by the Arbitrator that the non-tendering of exhibits used in the criminal case was fatal since it was shown that the applicant destroyed the said exhibits.

Mr. Bedder added that the Arbitrator erred by ruling that exhibit D1 (the auditor's report) could not serve the same purpose as an inquiry report. Regarding the applicant's concern that he is entitled to reinstatement, Mr. Bedder argued that the CMA awarded the applicant reliefs that he did not pray for. The Counsel referred to the case of ***Security Group (T) Ltd v. Yakobo and Others,*** Civil Appeal No. 76 of 2016 in which the CMA complaint referral form was equated with a plaint. He supported his argument with the case of ***Dew Drop Co. Ltd vs Ibrahim Simwanza,***

Civil Appeal No. 244 of 2020 in which it was stated that reliefs not prayed for, should not be granted.

Mr. Bedder elaborated that the applicant has already stayed out of employment for more than 10 years thus, the CMA found reinstatement was an unreasonable and practicable remedy for him because the work environment has changed from those that prevailed before the applicant was terminated. The Counsel prayed for the applicant's application to be dismissed for want of merits.

Mr. Saikon replied by submitting that the respondent had no valid reasons for terminating the applicant. He said the applicant was charged with grievous misconduct, negligence, and failure to comply with the employer's directives but the respondent failed to prove these reasons. The learned Advocate explained that the applicant was the respondent's Zonal Procurement and Supply Manager but other staff were also responsible for taking care of the stores. He argued that the applicant could not supervise the stores properly as they were located in two different places and guarded by security guards who were not called to testify in the disciplinary committee or the CMA.

According to Mr. Saikon, the alleged misconduct was not proved on the balance of probabilities to justify the termination. Regarding procedural fairness, Mr. Saikon argued that the respondent did not comply with the required legal procedure. He contended that the applicant was supposed to be disciplined by the TANESCO Board of Directors which was his disciplinary authority but the same was done by the Acting Regional Manager. He added that the respondent was not informed about the charge and was not

summoned properly to appear before the disciplinary committee to defend himself.

To support his argument, Mr. Saikon cited the case of ***National Microfinance Bank v. Victor Modest Banda***, Civil Appeal No. 29 of 2018, Court of Appeal at Tanga, in which disciplinary procedures were elaborated in detail. In faulting the procedure used by the Disciplinary Committee, the learned Advocate explained that the respondent's Staff Regulations prohibit the Committee from proposing a disciplinary penalty and the report to be relied upon to terminate the employee, but the same was not complied with.

Concerning the reliefs awarded to the applicant, Mr. Saikon conceded that the applicant never prayed for compensation in the CMA. In complaint Form No. 1, he prayed for the reinstatement only and he emphasized it in his testimony before the CMA. He cited the case of ***Judicate Rumishael Shoo and 64 Others v. The Guardian Ltd,*** Misc. Application No. 425 of 2020, High Court Labour Division at Dar es Salaam in which it was held that reference form is part of pleadings and reliefs should be contained therein. The learned Counsel concluded that the Arbitrator erred in awarding compensation to the applicant which he did not pray for.

Mr. Saikon invited this court to read the case of ***Marry Mbele v. Akiba Commercial Ltd***, Civil Appeal No. 302 of 2020, in which the Court of Appeal laid down the reasons for which an order of reinstatement may not be granted. The learned Advocate argued that none of those reasons exists in the instant case. He finally cited the case of ***Anna Mbakile v. DED Geita***, Labour Revision No. 113 of 2019, in which it was held that the court has the power to extend 12 months' compensation whenever necessary. He urged

the court to grant the applicant's prayers and dismiss the respondent's application.

Having considered the records in the case file, affidavits of the parties, and submissions by the learned Advocates, the question for determination by this court is whether there are sufficient reasons to revise the CMA award as prayed. Under Section 91 of ELRA, any party to an arbitration award of the CMA may apply to the Labour Court for it to be set aside if he alleges that there was misconduct on the part of the arbitrator, the award was procured improperly, or the award is unlawful, illogical or irrational. Sadly, neither the applicant nor the respondent considered these grounds for revision in their submissions.

Section 37 of the Employment and Labour Relations Act (ELRA) prohibits employers from terminating the employment of employees unfairly. The law is also settled that in determining the legality of termination, the courts consider the validity of reasons for the termination and the fairness of the procedure employed. In the case at hand, the records reveal that the applicant was terminated due to gross negligence occasioning the loss of TZS. 175,231,688.33/= to the respondent. The termination was preceded by the proceedings of the respondent's disciplinary committee.

A thorough examination of the parties' arguments establishes that apart from the reasons for termination and the procedure used, the parties are dissatisfied with the compensation awarded to the applicant by the CMA. Whereas the applicant asserts that he did not pray for compensation, the respondent argues that the compensation awarded to the applicant was on the high side. For this reason, I will focus on determining the propriety of

the compensation awarded to the applicant. In the course of the discussion, I will be referring to the parties' arguments.

As hinted, the applicant was the respondent's Regional Supplies and Transport Officer. His employment was terminated on the grounds of disciplinary misconduct to wit; gross negligence that led to the disappearance of the respondent's concentric single core cable measuring 16,059 meters long worth of TZS. 175,231,688.22/=. The basis of the misconduct was that the applicant failed to discharge his duties diligently as the head of his department who was responsible for supervising the performance of the staff under him and ensuring the safe custody of the respondent's properties coming in and getting out of the stores.

On page 14 of the CMA award, the Hon. Arbitrator was of the view that the respondent had no valid and fair reason for termination because the applicant was acquitted in a criminal case in which he was charged with economic crime and theft. He added that since the lost wire was stored in the yard under the safety of Alliance Security Services Ltd, the applicant could not be held responsible for the loss. As submitted by the Counsel for the respondent, the criminal accusations were different from the disciplinary misconduct that the applicant was facing. The two are distinct in terms of the laws applicable, the standard of proof, and the penalties.

The applicant's job description (Exhibit D2) is clear that as a Supplies and Transport Officer, his duties included maintaining and controlling stock of materials to ensure efficient delivery and issuing the same. During the disciplinary proceedings as shown in Exhibit D5, the applicant admitted that he was responsible for ensuring the safety of the lost wire. He did not

challenge any of his duties as enumerated in Exhibit D2 and that, he was duty-bound to supervise the staff working under him. I find the assertion that the lost wire was under the control of the security guards as baseless because the respondent was aware of the said security guards and still, appointed the applicant a supplies officer.

The complaint that the applicant found it unbearable to control the two stores located at different places is not supported by evidence on record because he never communicated such a hardship to the respondent. On the contrary, the records display that the applicant was reminded about negligent conduct on several occasions but he never improved. The Schedule to the Employment and Labour Relations (Code of Good Practice) G.N. No. 42 of 2007 enumerates disciplinary offences which constitute serious misconduct leading to the termination of an employee. One of them is causing loss to the employer's property through gross negligence or willful damage. The same is reiterated in the respondent's Standard Disciplinary Operating Procedure. Thus, it is the finding of this court that the applicant's employment was terminated for a valid and fair reason.

Concerning the fairness of procedure, Section 39 of the ELRA is to the effect that in any proceedings concerning unfair termination of employment, the burden of proving that the termination was fair lies to the employer. In the present case, Exhibit D3 displays that the applicant was served with a charge indicating the complained misconduct. He was given seven (7) days to present his defence in writing which he did via Exhibit D4. Therefore, the applicant's allegation that he was not charged formally is mere assertion without proof. Nevertheless, the applicant contended that he was informed

to appear before the disciplinary committee through a phone call within a few hours.

The respondent failed to prove that he afforded the applicant a reasonable time to prepare for the disciplinary hearing. The evidence on record shows that the applicant was notified to attend the hearing on the same day he was called by phone. In this circumstance, the applicant was denied his fundamental right to a fair hearing at the Disciplinary Committee. Article 13 (6) (a) of the Constitution provides that when the rights and duties of any person are being determined by the court or any other agency, that person shall be entitled to a fair hearing and the right of appeal or other legal remedies against the decision of the court or the other agency concerned.

Under Rule 13 (3) of the Employment and Labour Relations (Code of Good Practice), the employee is entitled to a reasonable time to prepare for the hearing and to be assisted in the hearing by a trade union representative or fellow employee. The respondent was thus, required to advise the applicant in writing of the allegations, date, and time of the proposed hearing, giving him a reasonable opportunity to prepare for the hearing. In ***Adela Damian Msanya v. Tanzania Electricity Supply Co. Ltd***, Civil Appeal No. 305 of 2019, the Court of Appeal at Arusha stated that what constitutes a reasonable time depends on the circumstances and the complexity of the case, but it should not normally be less than 48 hours.

In ***Jimsony Security Service v. Joseph Mdegela***, Civil Appeal No. 152 of 2019, the Court of Appeal held that:

"... the respondent is not to blame for not presenting to the committee his supporting documentary exhibits to bolster his side of the story...

Undoubtedly, the disciplinary proceedings against him were a flawed process even before they commenced; for the respondent was not served with any formal charge detailing the allegations levelled against him. As a result, when he appeared at the hearing, he was unprepared to present an effective defence and so, he could not proffer supporting documentary proof."

From the above authorities, it is evident that the respondent did not comply with the law to the letter in terminating the applicant. Since substantive and procedural fairness have to be proved cumulatively in the termination of employment disputes, the respondent's failure to abide by lawful procedure renders the entire termination of the applicant unfair. This takes me to a contentious point regarding the compensation awarded to the applicant by the CMA. In resolving this issue, I will let the law speak.

Starting with the respondent's concern that the compensation was on the high side, Section 40 (1) (c) of the ELRA stipulates that where an arbitrator or Labour Court finds a termination is unfair, he may order the employer to pay compensation to the employee of not less than twelve months remuneration. Based on the provision, it is undisputed that the law does not set the maximum compensation that the CMA may order. The CMA is left with discretion to determine the maximum amount considering the circumstances of each case.

In the instant dispute, the applicant was a managerial employee who had worked for the respondent for 17 years before the termination. For that matter, I do not consider compensation of 36 months as excessive. The argument that the compensation may set a detrimental precedent to the respondent and paralyze its undertakings countrywide, is a mere speculation on which the court may not base its decision. As long as the compensation

is within the ambits of the law, it cannot be regarded as illegal by considering the factors that are beyond the facts of the case before the court at present.

About the applicant's contention that the CMA awarded him compensation without considering that he prayed for reinstatement, it is the finding of this court that the argument lacks a legal base. Section 40 (3) of the ELRA provides that where an order of reinstatement or re-engagement is made by an arbitrator or court and the employer decides not to reinstate or re-engage the employee, the employer shall pay compensation of twelve months' wages in addition to wages due and other benefits from the date of unfair termination to the date of final payment.

Therefore, the law gives the respondent an option to exercise the discretion to reinstate or compensate the applicant, but the same option is not available for the applicant to choose between compensation and reinstatement. Rule 32 (2) (c) and (d) of the Labour Institutions (Mediation and Arbitration Guidelines) Rules, G.N. No. 67 of 2007 bars the Arbitrator from ordering a reinstatement of the employee where it is not reasonably practicable for the employer or where the termination was unfair because the employer did not follow a fair procedure.

In this case, I have shown that in terminating the applicant, the respondent did not comply with the legal procedure. Moreover, the respondent was categorical that since the applicant had stayed outside the employment for more than 10 years, the reinstatement would not be appropriate and practicable. For these reasons, there is no way this court may order the reinstatement of the applicant as prayed. Thus, the reliefs awarded to the applicant by the CMA remain intact. In the upshot, the

application succeeds to the stated extent. As the dispute is a labour matter, each party shall bear its costs.

It is so ordered.

KADILU, M.J.
JUDGE
12/06/2024

The ruling delivered in chamber on the 12th Day of June 2024 in the presence of Mr. Saikon Justin, Advocate for the applicant, and Mr. Gureni Mapande, State Attorney for the respondent.

THE HIGH COURT OF TANZANIA

KADILU, M.J.
JUDGE
12/06/2024