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IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

APPLICATION FOR REVISION NO 122 OF 2009

BETWEEN

TANZANIA TELECOMMUNICATIONS COMPANY LTD.....COMPLAINANT

AND

AUGUSTINE KIBANDU ..... RESPONDENTS

(Original CMA/DSM/KIN-ILA/4081/08)

RULING

24/11/2009 & 9/4/2010

Rweyemamu, R.M.J;

The respondent's employment was terminated on 3/7/2008. Dissatisfied, he referred the matter to the *Commission for Mediation and Arbitration* (CMA) on 16/7/2008, using the *statutory Form No.1* alleging unfair termination on ground that the reasons for his termination were not valid (**substantive unfairness**), and that the procedure used to terminate him was also unfair (**procedural unfairness**). The dispute was arbitrated and an award subject matter of this revision application issued on 25/5/2009. In the impugned award, the arbitrator found both grounds established by the respondent; ordered reinstatement and payment of salaries from the date of termination. The applicant believes the decision was in err and ought to be revised, the position refuted by the respondent. Hearing of the matter proceeded by way of written submission.

In the affidavit in support of the application, the applicant sought revision on the following grounds:

"...

i. That the arbitrator E. Mwindunda erroneously misguided himself by not recording and considering witness evidence tendered by Defence witnesses (DW 4 Mary Lauwo, DW5 Macdard Lyimo, DW6 Silvester Ruchibwingango and DW7 Paul Onesmo sanare) whose evidence was to the effect of explicitly explaining the cause of the respondent's termination.

ii. That such omission of recording relevant material facts form the statements issued by these witnesses has led the Applicant to suffer manifestly the resultant costs for reinstatement and other costs which were derived from the said erroneous decision.

iii. That the factual omission above was such that all Defence Witnesses denied to have requisitioned or received the said sleeves that were stolen by the Respondent who had allegedly purported to have sent them through Ems and by bus transport.

iv. That it is these patent omissions on the face of the record that the Applicant is now praying to this court to rectify by way of review or retrial so that justice may triumph."

In the counter affidavit, the respondent submitted in brief that:

a. Evidence was properly recorded and considered, the evidence had no weight to prove/justify the allegation.

b. Para iv. and v. are denied and:

c. The evidence proves that he was not afforded opportunity to be heard during the disciplinary proceedings.

On 29/11/2009 hearing of the application was ordered to proceed by way of written submissions which were thereafter filed by one Paulo Karlo Kalomo, indicated as Counsel for the applicant, and an unnamed advocate from Dar es Salaam Law Chambers for the respondent.

The applicant's submission was to the effect that; its defence witness (4-7)'s evidence was not given due weight and in respect of substantive issue, that the respondent gave no evidence save forged receipts, to prove he sent missing equipment-subject matter of the misconduct charge.

The respondent initially raised some preliminary points to the effect that; the application was incompetent because relevant provisions of the law were not cited in the chamber application. He cited the CAT authorities in **National Bank of Commerce v. Sadrudin Meghji,** *Civil Application 20/1997 (unreported)* to support the proposition that the application was incompetent because the court has not been properly moved; **Almas Iddie Mwinyi v. NBC and Another**, *Civil application 88/1998* holding that both wrong citation and no citation renders an application incompetent: A position emphasised in **Sea Saigon Shipping Ltd v. Mohamed Enterprises (t) Ltd,** *Civil Appeal 37/2005 (Unreported).*

On the issue of wrong citation, I find at the outset that in my opinion, what is vital is to follow the format set for applications under rule 24 of the Labour Court Rules, GN 106/2007. The rule prescribes under rule 24 (2)

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and (3) vital content for applications-like applications for revision under rule 28. In this case, the applicant filed a a notice of review under rule 27(5) of the rules, it is on this ground I find that the court has not been properly moved.

That apart, I have considered the parties arguments in light of the facts on record. Issues framed by the arbitrator were: One, whether misconduct was proved as per section 37 (2) (a) & (b) of the Employment and Labour Relations Act, 6 of 2004 i.e. whether termination was substantively fair and: Two whether the respondent's termination was procedurally unfair in terms of Rule 13 of the Employment and labour relations (Code of Good Practice) rules, GN 42/2007.

Regarding the 2nd issue, the arbitrator reasoned as follows:

"Utaratibu huu ndio dhana katika kanuni ya 13 cha GN.42/2007 mlalamikaji hakutendewa yote haya. Mlalamikiwa kupitia shahidi wake ***DW1 Mr. Mhando*** *amesema mlalamikaji alijitetea kupitia maandishi. Nimesoma barua za tuhuma na hata ya kuachishwa, utetezi unaosemwa kwamba aliufanya ni ule ambao alimjibu Auditor, huu hauwezi kuwa ni utetezi kwa sababu utetexi ambao sheria inaujua ni ule anaoutoa baada ya kupata charge-sheet na pale anapopewa fursa ya kuhoji mashahidi wa mwajiri. Utetezi kabla ya charge-sheet si muafaka kisheria, rejea kanuni ya 13 (1) (2) (3) ya G-N. 42/2007.* ***DW1*** *amesema pia* ***kwamba mlalamikaji hakustahili kupewa fursa ya kujitetea kwa sababu kosa lake lipo wazi kwahiyo hakustahili kuunda kamati ya nidhamu, hoja hii haina mashiko kisheria, katika shauri hili mlalamikaji amepinga kosa wakati wote kwahiyo uwazi haupo. Uwazi wa kosa unakuwepo mtu akikiri kosa, hata hivyo katika hali hiyo kamati bado lazima iunde kujadili adhabu na kusikiliza utetezi adhabu (mitigation),*** *rejea kanuni hiyo ya 13 GN 42.*

Kwa hiyo uachishaji huu ulifanya kwa kukiuka utaratibu. Mlalamikaji amejitetea pia kwamba yeye hangeweza kufuata utaratibu kwa sababu ametumia haki yake ya kimkataba ya kuvunja mkataba wao, ametumia kifungu cha 41 cha ***ELRA*** *kama kinga kwake. Nimesoma kifungu hiki na kukiona kiko "subject" kwa kifungu cha 37 cha* ***ELRA*** *kama hakuna "Mutual agreement" kuvunga mkataba."* (Emphasis mine)

Based on the evidence on record, the respondent was not given a fair hearing in terms of Rule 13 of the Code; as such the arbitrator's reasoning cannot be faulted. The applicant admitted that the respondent was not afforded proper opportunity to be heard. Perhaps it is worth stressing that a right to be heard in employment termination cases embodies the constitutional right not to be condemned unheard, that right is part of fair labour practice in the work place – which are part of the objectives spelled out in section 3 (a)(f) and (g) of the Act. Be that as it may, I agree with the arbitrator that on the evidence adduced and as demonstrated uncontested, the respondent's termination was procedurally unfair. The application is for that reason dismissed.

R. M. Rweyemamu
JUDGE
9/4/2010

Date: **09/04/2010**

Coram: Hon. R.M. Rweyemamu, J.

Applicant:

For Applicant: Alex George – Human Resources Office of the company

Respondent:

For Respondent: Allen Mwakyona Legal Officer

C.C. Josephine Mbasha

Order: Ruling delivered this 9/4/2010. R/A Explained.

R. M. Rweyemamu
JUDGE
9/4/2010