

**IN THE HIGH COURT OF TANZANIA**

**LABOUR DIVISION**

**AT DAR ES SALAAM**

**REVISION NO. 94 OF 2016**

**BETWEEN**

**AFREXA ..... APPLICANT**

**VERSUS**

**RAMADHANI BAKARI ..... RESPONDENT**

**JUDGMENT**

**Date of Last Order 25/04/2018**

**Date of Judgment 18/05/2018**

**NYERERE, J.**

The applicant/ **AFREXA** has filed the present application seeking revision of the decision and award of the Commission for Mediation and Arbitration (Herein to be referred as CMA) which was delivered on 18<sup>th</sup> February, 2016 in favour of the respondent/ **Ramadhani Bakari**.

The series of events leads to the present application as per supporting affidavit filed in this court in support of the application are that; Complainant referred a claim of unfair termination to the CMA, in which the Respondent alleged complainant was never terminated from his employment but was handed over to the Respondent's client (MIC Tanzania LTD). Also complainant had less than six months in the

employment; however CMA ordered compensation of 4,101,600 to the complainant. The decision aggrieved applicant who filed the present revision application faulting Arbitrator's award.

That having been seriously aggrieved by the whole of the said award, basing on above events and facts which establish several legal issue the applicant seek revision of the said award on the following grounds.

- (a) That the Arbitrator erred in law by adjudicating a matter of unfair termination where the Respondent had only two months in employment. Furthermore in the Award the Arbitrator acknowledge the fact that the Respondent was employed for two months. Copy of the Award is hereby attached for ease of reference.**
- (b) That the arbitrator erred in law by taking into account the Respondents testimony without having concrete evidence to support the same. The respondent claims that he was terminated, The Arbitrator relied upon his mere statement**

**without proof of "Termination Letter" to prove  
that the Respondent was indeed terminated.**

At the hearing of the application Mr. Godfrey Tesha learned counsel appears for the applicant whereas Advocate who was representing the respondent withdrew from representing the respondent due to lack of proper instructions therefore hearing proceeded Ex-parte as the respondent has never appeared in this case and is nowhere to be seen. The matter was argued orally.

Arguing the application Mr. Godfrey Tesha Counsel for Applicant commenced with a prayer to adopt the supporting affidavit to form part of his submission, and proceeded to argue that he is aggrieved by the presiding arbitrator for determining matter of unfair termination while Respondent worked for the applicant for two months.

Counsel for Applicant went on to submit that, Section 35 of The Employment and Labour Relations Act No. 6/2004 prohibit an employee who has worked less than six months to refer a dispute of unfair termination to the CMA, he cited the case of Labour Dispute No. 30/2010 Mwaitenda Ahobokile Michael Vs Interchick Co. Limited where at page 6 last paragraph Hon. Judge Mipawa held that:

**"The complainant is prevented by the law from bringing any action before this court for the purpose of enforcing any right based on unfair termination, as the complainant was only a month and some nine days life his employment.".**

Submitting in regard to arbitrator's decision that respondent was unfairly terminated while there was no proof of the termination, Counsel for Applicant argued that applicant's company was a recruitment agent, that employed the respondent as a driver and posted him to work at TIGO TANZANIA LTD, where it was alleged he committed a misconduct of stealing fuel, however there was no proof of theft.

Counsel for Applicant further argued there is no evidence that TIGO TANZANIA LTD refused to continue to work with the respondent, applicant only requested the respondent to hand over all properties of TIGO TANZANIA LTD and return back to the office (applicant's), so that applicant could find him another job, but the respondent never return back to the office and went forth to refer the matter to the CMA.

Furthermore Counsel for Applicant observed that at CMA applicant's witness DW1 insisted and testified that respondent have never been terminated, however arbitrator relied on respondent words that he was orally terminated by the applicant on 24<sup>th</sup> February, 2014. There was never

a termination letter. Counsel for Applicant prays the court to revise and set aside the award.

After carefully considered the applicant's submission, CMA records, Affidavit and Counter affidavit filed in this court, labour laws and practice of this court my decision on the matter as hereunder.

The issue for determination is whether or not Arbitrator's finding that respondent termination was procedurally unfair is justifiable under the law; The well established principles under Section 37(2) of the ELRA is that no termination is permissible in law if it does not follow a fair procedure; the said principle was rooted from Article 7 of the ILO Termination of Employment Convention, 158 of 1982 which became operational on 23/11/1985, which provides that;

**"...the employment of a worker shall not be terminated for reasons related to the workers conduct or performance before he is provided an opportunity to defend himself against the allegations made".**

The relevant procedures to follow during termination of employment contract on misconduct is provided under Rule 13 of the Employment and Labour Relations (Code of Good Practice) GN 42/2007 which among other procedures requires employer first to conduct investigations to ascertain

whether there're are grounds for hearing to be held. I must point out in the outset in the present case Mr. Edmund Marcel/ General Manager of Afrexia in his testimony, confirmed to the allegations against the respondent, that

**“mfanyakazi wetu alilalamikiwa na kampuni ya  
Tigo kwa tuhuuma za wizi wa mafuta ya gari  
aliyokuwa akiendesha”.**

Further established that there was no proof of the alleged theft, against respondent, in which Tigo were to produce proof of the alleged theft, which was CCTV footage, in my opinion the applicant was to investigate the matter.

On the other hand, respondent was to report back to Afrexia, something which respondent did not do according to the testimony of Edmund Marcel/ General Manager at page 12 of the CMA proceedings. In that, Mr. Edmund Marcel insists to have never terminated respondent's employment.

Further in re examination, respondent confirmed being required to return to the applicant's office, that the applicant's summoned him via email, and conducted a meeting, to inquire on the alleged theft at page 14 of the CMA proceedings.

From the above, applicant has discharged his burden on balance of probabilities under Rule 9 (3) Employment and Labour Relations (Code of Good Practice) GN. 42/2007, which reads that:

...the burden of proof lies with the employer but it is sufficient for the employer to prove the reason on balance of probabilities....

Furthermore, in this case respondent was never charged of the alleged misconduct nor investigated in which would have required the applicant to conduct a disciplinary hearing on the findings of the offence, therefore to avail respondent a right to be heard. Such need was unnecessary because respondent left his employment before investigation was conducted, when he was asked to return to the applicants office, a fact which is not disputed by both parties, he never return instead he opted to file a complaint at CMA.

In regard to the above observation, I am compelled to agree with the applicant contention that, respondent was never terminated from employment, thus the applicant/employer duty to prove the termination was fair as per Section 39 of Employment and Labour Relations Act did not arise. Also on the requirement of fair labour practice during termination as observed in this Court, in the case of **Nickson Alex v. Plan International Ltd, Revision No. 22/2014 HC Labour Division Mwanza Sub registry (Unreported)**

where court stressed on the importance of fair labour practices during termination.

I am therefore of the view that the Arbitrator was wrong to determine that respondent was terminated from employment without following proper procedure. I hereby fault the Arbitrator's decision that applicant termination was procedurally unfair, consequently I proceed to quash and set aside arbitrator's decision. In the end result I find this application merited.

It is so ordered.



**A.C. Nyerere**

**JUDGE**

**18/05/2018**