IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 372 OF 2019

BETWEEN

ATHUMANI RAJABU SALEHE.....APPLICANT

VERSUS

SPEED SECURITY SERVICES LTD.....RESPONDENT

JUDGEMENT

Date of Last Order: 10/07/2020

Date of Judgement: 17/07/2020

Aboud, J.

The Applicant in this revision application calls upon the Court to examine and revise the Commission for Mediation and Arbitration (herein CMA) award in Labour Dispute No. CMA/DSM/ILA/R.18/17/57, Dar es Salaam delivered by Hon. Igogo, M. Arbitrator dated 14/06/2018.

The application is made under Section 91 (1) (a), 91 (2) (c) and 94 (1) (b) (i) of the Employment and Labour Relations Act No. 6 of 2004, together with Rules 24 (1), 24 (2) (a) (b) (c) (d) (e) and (f),

24 (3) (a) (b) (c), 24 (11) and Rule 28 (1) (c) (d) (e) of the Labour Court Rules, GN No. 106 of 2007.

The background of the dispute in brief is that the applicant was employed by the respondent as a security guard form 05/03/2011 to 08/12/2016. On 27/02/2015 he was severely injured in a read accident at Masaki which Sea Cliff Luxury apartment around 12:00 pm while discharging his duty involved his office motorbike and a vehicle.

The record reveals that he was under medication for almost ten months and he could not attend at work. At all that time the applicant continued to receive his salary of Tshs. 115,000/= until December, 2016 when he stopped to receive his salary as he said was terminated from the employment. Aggrieved by such decision applicant referred the complaint to the CMA on 05/01/2017. The CMA indeed determined the complaint which revolved around unfair termination of employment and found there was no termination of the applicant's employment.

Being dissatisfied with the CMA award the applicant knocked the doors of this Court, hence this revision applicant.

The application was head by way of written submission and the applicant appeared in person while Ms. Catherine Lyasenga represented the respondent.

The affidavit in support of the application, under paragraph 7 has four grounds of legal issues for the Court determination. For easy of reference, they are as follows; I quote:-

(a) Whether it was proper for the Arbitrator to make a finding on an issue which was not part of dispute and no evidence was given to support those findings.

(b) Whether the employee's benefits was legally determined.

(c) Whether it was legally proper for the Arbitrator to hold that, the applicant was not terminated.

(d) Whether the Arbitrator was legally presided and the matter was determined on merit since the decision was based on less substantive issues.

The respondent bitterly challenged the application through the counter affidavit of Ms. Catherine A. Lyasenga.

Arguing in support of the application the applicant came up with seven (7) legal issues instead of 4 as they are in his supporting

affidavit. The requirement of legal issues to be in applicant's affidavit is a statutory one as per Rule 24 (3) (c) of the Labour Court Rules. Thus, the Court will focus on the issues as they are in the applicant's affidavit.

The applicant therefore did not submit on the first legal as it appears herein above. Applicant submitted on the second issue, that whether the employee benefits were legally determined as it appears in his submission as ground (d) that the Arbitrator failed to determine the applicant benefits thereafter he concluded there was no termination.

As regard to the third issue, that whether it was legally proper for the Arbitrator to hold that the applicant was not terminated which reads as ground (b) in his written submission, applicant submitted that, the Arbitrator wrongly decided that there was no valid reason while he was termination terminated without valid reason and procedures were not followed. He referred the Court to section 37 (2) (c) of Act and Rule 13 of the Employment and Labour Relations (Code of Good Practice) GN. 42 of 2007 (herein referred as the GN. 42). The applicant did not argue on the fourth issue.

In response, Ms. Catherine Lyasenga, Learned Counsel submitted that contrary to the law the applicant submission challenged the award by relying on six (6) grounds which are stipulated in Notice of Application instead of four (4) issues in paragraph 7 of the affidavit as required in law that is Rule 24 (3) (c) of the Labour Court Rules. So she responded to only two issues.

Ms. Catherine submitted on the first issue that Arbitrator erred in law and fact to decide there was no termination of employment. She said this was the main issue at the CMA. The Learned Counsel stated according to the evidence on record, to wit the evidence of DW1, he testified that on the 08/12/2016 the date which the applicant claims to be terminated from employment, he went to his work place to collect his salary as he used to do. The applicant was informed by the respondent that, he will be given or assigned light work because of his health condition.

However, applicant refused to collect his salary and he lodged his complaint at the CMA that he was unlawfully terminated. Respondents counsel further submits that, the applicant himself admitted the fact during arbitration hearing. She said, the intention of the respondent to offer light work to the applicant was not to

terminate him from employment but rather was to let him perform light duty and, that was the reason why he continued to pay the applicant's salary in full for one year and nine months from the date the applicant got the accident. Ms. Catherine, learned counsel submitted that the law is very clear that applicant was required to produce a medical certificate so as to be paid sick leave. She said, such requirement is under section 32 (2) (a) of the Act and DW1 testified to that effect. The Learned Counsel argued that, the respondent was lenient to pay the respondent a sick leave over and above what is stipulated under section 32 (1) of the Act, which is at least 126 days in any leave cycle. She said the applicant received his full salary from 27/02/2015 to November, 2016.

According to Ms. Catherine, Learned Counsel the applicant was supposed to be paid sick leave in full pay for the first 63 days and half pay for the remaining 63 days as is required under section 32 (2) (a) (b) of the Act. So she said that, the respondent with good intention decided to pay the applicant full salary for all 126 days.

Respondent's counsel further argued that the respondent intention to give the applicant light duty was to comply to the legal requirement as is provided under Rule 19 (5) (6) (b) of the

Employment and Labour Relations (Code of Good Practice) Rules 2007 (herein referred as the GN. 42). She said the relevant rules required the respondent to consider the applicant's health condition in assigning light duties but the respondent refused as was testified by DW1 at the CMA.

Ms. Catherine, Learned Counsel strongly submitted that in this matter therefore, there was no any termination of the applicant's employment as claimed. She said the Arbitrator did not error in law and fact to hold that there was no termination of employment as per section 36 (a) (i) (ii) (iii) (iv) and 36 (b) of the Act.

Respondent's counsel therefore concluded that, since there was no termination of employment the applicant's submission on procedural fairness of the purported termination cannot apply in this matter. She said the applicant confused his claim of compensation for injury caused at work and other claims for his NSSF contributions and indemnity from the Insurance Company for the injury he suffered in the accident. She said, these claims cannot be entertained by the CMA because has no jurisdiction according to the governing labour laws.

Ms. Catherine submitted that on other issues or ground of revision they have no merit. Thus, she prayed the application be dismissed.

After consideration of parties' submission, Court record, the relevant applicable labour laws and practice with eyes of caution, I found the issues for determination in this matter are; whether the CMA award was properly procured and what reliefs the parties entitled. In determination of the issues at hand, I will discuss the grounds for revision as argued by the parties and relevant governing laws.

At the outset let me say termination of employment at the employee's will, that is the right to hire and fire is not part of the Tanzania laws. Under the labour laws of this country the employee has a legitimate right to expect that if everything remains constant he/she will be in the services throughout the contractual period. That is why the employee has remedy where that right is breached by way of special damages, compensation and reinstatement orders.

Therefore termination by the employer in any contract of employment be it fixed term contract or contract indefinite in

duration, they must comply with the requirements of Section 37 (1) (2) of the Act and Rule 8 of the GN. No. 42 of 2007.

Therefore termination by the employer in any contract of employment whether it is on fixed term contract or contract indefinite in duration, they must comply with the requirements of Section 37 (1) (2) of the Act and Rule 8 of the GN. No. 42 of 2007.

It is the established principle that for the termination of employee to be considered fair it should be passed on valid reason and fair procedure. That is to say, there must be substantive fairness and procedural fairness of termination of employment. Section 37 (2) of the Act provides that:-

> "37 (2) - A termination of employment by an employer is unfair if the employer fails to prove:-
>
> (a) That the reasons for termination is valid;
>
> (b) That the reason is a fair reason:-
>
> (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".

It is crystal clear that the intention of the legislature is to require employers to terminate employees only basing on valid reasons and not their will or whims. This is also the position of the International Labour Organization Convention (ILO) 158 of 1982, Article 4 which provides that:-

> "The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on operational requirements of the undertaking establishment or service".

In that spirit employers are required to examine the concept of unfair termination on the basis of employee's conduct, capacity, compatibility and operational requirement before terminating employment of their employees.

Having discussed the position of the law, I will consider the third issue in this revision as reflect herein above. In the Arbitrator's finding he concluded that there was no termination of employment contract of the applicant. According to the facts, evidence in this case and as is at page 6 in paragraph 4 of the CMA award, the applicant decided to stop attending to the work place from 08/12/2016 when he went to collect his salary and was told to begin working in light duties. Applicant refused such proposal and instead he quitted the job as was testified by DW, at the CMA. It is on record and as rightly submitted by Ms. Catherine, learned counsel for the respondent that, the applicant after he was severely injured he stayed home for more than one year and nine months. In all such time the applicant was paid his full pay despite the fact that he had to get sick leave pay of only 126 days and not more as is stipulated under section 32 (1) of the Act; I quote:-

> "32 (1) - An employer shall grant an employee at least 28 consecutive days' leave in respect of each leave cycle, and such leave shall be inclusive of any public holiday that may fall within the period of leave".

Section 32 (2) (a) (b) of the same Act provide that:-

> "32 (2) - The sick leave referred to in subsection (1) shall be calculated as follows:-
>
> (a) The first 63 days shall be paid full wages.
>
> (b) The second 63 days shall be paid half wages".

And section 32 (3) (a) of the Act, states that:-

> "32 (3) - Notwithstanding the provisions of subsection (2), an employer shall not be required to pay an employee for sick leave if:-
>
> (a) The employee fails to produce a medical certificate".

Despite the legal requirement as discussed above, the evidence of DW1 and that of the applicant himself reveals that, the applicant was paid his full salary within the whole period when was sick for the injuries he sustained in an accident as evidenced by petty cash vouchers (Exhibit D1 collectively).

It is on record and parties' submission that, on 08/12/2000 the applicant went to the respondent to collect his salary. However, the respondent informed him to report to work and will be assigned to perform light duties according to Rule 19 (5) (6) (b) of the GN. 42 which provide as follows:-

> "19 (5) Where the employee is likely to be absent for a time that is unreasonably long in the circumstances, the employer shall investigate possible ways to accommodate the employee or to consider all possible alternative short of termination.
>
> (6) Possible alternatives short of termination shall include:-
>
> (b) light duty;

Applicant refused to perform light duties on the reason that he was still sick and wanted to attend medication at the hospital. According to evidence of DW1 and the applicant himself, he never went back to work after 08/12/2016.

In record, the only evidence that the applicant adduced to show that was terminated is that, he was verbally informed by DW1 that,

he was terminated. This evidence was strongly resisted by the respondent witness (DW1) who testified that, there was no termination of employment of the applicant as he claimed.

In my view there is proof that the applicant was not terminated from his employment. In other words there was no termination in this case as correctly submitted by the respondent. The Arbitrator considered the evidence of the DW1 and the applicant himself that he stopped attending at the work place on 08/12/2016. So the Arbitrator rightly decided on the first issue among the three which were before the CMA for determining that, I quote:-

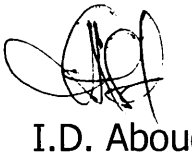
> "Kama mlalamikiwa alimwachisha mlalamikaji kazi"

That means, whether the employer/respondent herein terminated the employment contract of the employee/applicant. Respectfully the Arbitrator correctly determined the issue when he said since there was no termination there was no justification to discuss the two elements for fair termination, which is substantive and procedural fairness of termination. In other words whether there was valid reason and fair procedures for termination in this matter.

On the basis of the above I also fully agree with Ms. Catherine, Learned Counsel for the respondent, that since there was no termination of employment other two remaining issues need not to be determined.

In the result this application has no merit and is hereby dismissed.

It is so ordered.



I.D. Aboud

JUDGE

17/07/2020