IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

LABOUR REVISION NO. 694 OF 2019

BETWEEN

MOHAMEDI KIJIDA..... APPLICANT

VERSUS

EVERYTHING DAR. COM LTD.....RESPONDENT

JUDGEMENT

Date of Last Order: 13/07/2020

Date of Judgement: 14/08/2020

Aboud, J.

The application is made under section 91 (1) (a) (b), 91 (2) 91 (1) (a) (b) & 91 (2) (a) (b) and 94 (1) (b) (i) of the Employment and Labour Relations Act No. 6 of 2004 (here forth the Act) and Rules 24 (1), (2) (a) (b) (c) (d) (e) (f), (3) (a) (b) (c) (d) and 28 (1) (a) (b) (c) (d) (e) of the Labour Court Rules, GN No. 106 of 2007 (hereinafter the Labour Court Rules).

The applicant, Mohamed Kijida calls upon the Court to call for record, examine, revise the proceedings and set aside the award issued by the Hon. Nyagawa, P. Arbitrator of the Commission for Mediation and Arbitration (CMA) in the CMA/DSM/KIN/R. 420/18 dated 30/07/2019.

The application was heard by way of written submission as ordered by the Court. Ms. Anitha Fabian Bandoma, Learned Counsel represented the applicant while Mr. Avitus Rugakingira, Learned Counsel was for the respondent.

The background of the application is; on 20/04/2016 the applicant was employed by the respondent as Finance and Administration Manager and their employment contract was for unspecified period of time. However, on 16/03/2018 the respondent decided to terminate him as is indicated on record (Exhibit A6). The reason for such termination was the applicant's poor performance.

The applicant was aggrieved by the applicant's decision to terminate his employment contract and, he referred his claim for unfair termination at the CMA. After consideration of the whole complaint including evidence adduced by the parties, the CMA found

the dispute of unfair termination was devoid of merits and dismissed it accordingly.

The affidavit in support of the application, under paragraph 4 has four grounds or legal issues for the determination of this Court. For easy of reference, they are as follows, I quote:-

(1) That the Honourable Arbitrator erred in law and fact by failing to consider the evidence adduced by the applicant that there was no valid reason and fair procedure to terminate the applicant on the basis of poor performance.

(2) That, the Honourable Arbitrator erred in law and fact by failing to distinguish between Everything Dar Com Ltd. as employer and ROAM as different legal entities.

(3) That, the Honourable Arbitrator erred in law and fact by failing to consider that the applicant was not issued with a notice to terminate his contract as per employment contract.

(4) That, the Honourable Arbitrator erred in law and fact by failing to consider the reliefs sought by the applicant.

Submitting on the first issue for Revision, Ms. Anitha Fabian Bandoma, Learned Counsel submitted that in his award the Arbitrator

failed to consider the evidence by the applicant which resisted to the unfair termination. She further argued that, Arbitrator did not take into account various factors in determining whether there was poor performance or not as provided under Rule 17 (1) (a-e) and Rule 18 (1) (2) of the Employment and Labour Relations (Code of Good Practice) Rules, GN. No.42 of 2007, (to be referred as the Code herein).

Ms. Anitha Fabian Bandoma further submitted that the applicant was the employee of the respondent, Everything Dar Com; however the form as well as performance standards which were used to appraise him belonged to ROAM COMPANY which is a separate entity to the respondent. She argued that, it was in evidence the applicant was not given job description when was employed. She said the ROAM COMPANY job description was given to the applicant thereafter which was not the applicant's employer. Applicant's counsel contended that, the ROAM COMPANY posed as the applicant employer and imposed unreasonable performance standards which were not agreed by the parties herein. She submits that, the applicant was placed in performance improvement plan (PIP) which was not clear and useful to his work performance.

The Learned Counsel strongly argued that when the respondent observed the applicant's performance was poor was supposed to give him training as is provided under Rule 18 (1) (2) of the Codes. She said, in applicant's performance appraisal no evidence in form of report was adduced to prove or justify the allegation that led to his termination, which was missing of revenue. In conclusion the learned counsel submitted that, the Arbitrator did not consider that there was no valid reason and fair procedure to terminate the applicant because of poor performance.

On the second issue, the learned counsel for the applicant strongly submitted that, the Arbitrator erred in law and fact by failing to distinguish between the respondent as an employer and ROAM Company as a different legal entity. She argued that, those two companies both have capacity to hire and give job description to their employees. Thus, it was not proper for the ROAM Company to conduct performance appraisal of the applicant who was not its employee.

On the third issue, the applicant's counsel submitted that the Arbitrator erred in law and fact by failing to consider that, the applicant was not issued with a notice of termination of his employment contract. She further argued that according to item 13 of the employment contract (Exh. D1) it provides for, either party had right at liberty to terminate that contract upon issuing three months' notice prior to termination. She said, the respondent did not issue the relevant notice to the applicant prior to the termination of employment, but the applicant got a one month notice after termination of his employment.

On the last issue the applicant's counsel submits that, the Arbitrator erred in law and fact by failing to consider the reliefs sought by him. She contended that Arbitrator failed to consider the fact that, the applicant was entitled to be awarded a certificate of service which was his entitlement under section 44 (2) of the Act.

Finally the applicant counsel prayed that the application be allowed.

Resisting strongly to this application Mr. Avitus Rugakingira, Learned Counsel of the respondent on the first issued submitted that,

the testimony of DW1 for the respondent made it very clear the respondent is a subsidiary company of ROAM Company. He further stated that, all the Human Resource standards of the respondent are set by ROAM Company and applies to all its subsidiary companies including the respondent's employees. He contended that, the performance appraisal of the applicant was not conducted by ROAM but it was the respondent who did the actual appraisal. He said the names on the appraisal form are those of the applicant and DW1 the appraiser to whom the applicant was reporting.

Mr. Avitus Rugakingira further submitted that about job description of the applicant, it is very clear from the record that he was issued job description which was part of his contract as is in Exhibit D1 on record. He said the Arbitrator considered that evidence in his award.

As regard to the provision of training to the applicant according to Rule 18 (1) and (2) of the codes, the learned counsel submitted that when it was realized the applicant's working performance was poor, he was placed under the performance improvement plan (PIP) and together with number meetings were conducted between the applicant and his seniors in view of coaching him how to improve his

performance. He submitted that, the applicant belonged to the position of a manager and according to Rule 18 (5) (a) of the Code, it allows employer to dispense with giving an employee an opportunity to improve his capacity if he is a manager like the applicant in this case. He further submits that, the applicant's working experience of over 15 years as a finance manager would have been to his advantage to evaluate himself whether he performed to the required standard or not.

Mr. Avitus Rugakingira also told the Court, it is not true that applicant was terminated because of the missing revenue accounts reports for Brighter Monday, but the reason for his termination is as indicated in his termination letter (Exhibit D13) which is poor performance.

On the second issue, Mr. Avitus Rugakingira submitted that it was testified and proved at the CMA that, the respondent is a subsidiary company of the ROAM Company which is responsible to set all Human Resource Standards including performance appraisal. He further submits that, the applicant's performance appraisal was conducted by the respondent Chief Executive Officer as is reflected in Exhibit D2 on record. He argued that, the relationship between the

respondent and ROAM Company necessitated the use of the relevant appraisal form by the one who appraised the applicant, DW1.

As for the third issue, the respondent's counsel submitted that, the respondent complied with the terms of contract regarding issuing of three months' notice. He said the applicant was paid three months' salary in lieu of notice as required in law. The learned counsel said applicant received such payment as is reflected in Exhibit D13, thus Arbitrator considered such evidence in his award.

On the last point the learned counsel for the respondent submitted that, the applicant rightly claimed for the certificate of service. He said such claim is according to the labour laws and had no objection on the issue. In conclusion he prayed the Court to dismiss the application for lack of merits and uphold the Arbitrator's award.

In her rejoinder the applicants' counsel reiterated her submission in chief. She resisted the submission by respondent that the applicant had job description as per Exhibit D1. In her submission she said, the date of Exhibit D1 is different from that in the employment contract.

I have gone through parties' submission, Court records and relevant laws in this matter. Thus the main point of determination before the Court is whether the CMA award was properly procured. However, in determining the point at hand the Court will thoroughly discuss each issue for the revision as raised by the applicant and argued by both parties.

Before I proceed, let me say that the right to hire and fire is not part of our labour laws. In other words there is no termination of employment at the employees' will which is entertained in this country. Under the available Labour laws, the employee has a legitimate right to expect that if everything remains constant will be in the service throughout the contractual period. In that context, the employee has remedy where his/her right is breached by way of compensation, reinstatement and special damages orders. Also it has to be observed that, notice of termination is one of the required means of termination as it is in many employment contracts, but does not replace the requirement of giving reason for termination and following fair procedure.

That is to say termination by the employer in any contract of employment be it fixed-term contract or contract of unspecified time

limit they must comply with the requirements of the relevant provisions of the governing laws.

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. Needless to say, there must be substantive fairness and procedural fairness of termination of employment. Section 37 (2) of the Act provides that:-

> "(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".

The legislature's sprit in the above provision is to ensure that termination of employment is based on valid reason and not on employee will. That spirit goes along with Article 4 of the International Labour Organization Convention (ILO) 158 of 1982, 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.

In the same vain even where employer and employee agrees that termination has to be on notice, they are bound to comply with the provisions of Section 41 (3) of the Act, which provides that:-

"Notice of termination shall be in writing, stating:-

(i)The reasons for termination and

(ii) The date on which the notice is given".

Thus, even if a contract of employment can be terminated on notice, that shall not affect the right of an employee to dispute the lawfulness or fairness of a termination of employment under the Act or any other law as it is provided for in Section 41 (7) (a) of the Act.

In this matter the respondent terminated employment contract of the applicant on the ground that his performance was poor. It is the established principle in law that in each reason for termination need to be dealt with on its merits and a fair procedure applies in each case. The law requires Arbitrators and Judges in determining the fairness of termination for poor work performance, should consider that the performance standard is not only reasonable but is also known to the employees. In other words they have to consider and comply with Rule 15 (2), 16, 17 and 18 of GN. No. 42 which provides for fair procedure, including right to be heard.

From the record in Court and submissions by the parties, it is clear that Arbitrators' award in this matter was based on the parties' testimony, evidence tendered and the relevant governing laws.

The court will deal with the first and second issues together. That the Arbitrator erred in law and fact by failing to consider the evidence adduced by the applicant that, there was no valid reason and fair procedure to terminate the applicant on the basis of poor performance. And the Honourable Arbitrator erred in law and fact by failing to distinguish between Everything Dar Com Limited as employer and ROAM as different legal entities.

In determining this dispute between the parties as complained by the applicant that, he was unfairly terminated, Arbitrator framed three issues:-

(i) Whether the complaint performed his duties to the required standard according to his contract of employment.

(ii) Whether procedures for termination were adhered and

(iii) Relief sought to both parties.

As I said herein above Arbitrator considered evidence adduced by the parties. In determining the performance standard of the applicant he considered the position of the applicant as a Manager of Finance and Administration what was he expected to do in such position. The applicant testified that he had no job description, the situation which contributed to his poor performance. In his evidence he also testified that, the performance standards were set by ROAM Company and not the respondent and were unreasonable as were not agreed by the parties.

As it is in law, the burden of proof as to whether termination of employment was fair substantially and procedurally is on the employer as is provided under section 39 of the Act, which provides that:-

> "In any proceedings concerning unfair termination of employment of the employee by an employer, the employer shall prove that termination is fair".

On the basis of the above position of the law, the Arbitrator also considered the evidence of the respondent as the one who had a duty to rebut the applicants' claim of unfair termination. It is on

record that Arbitrator considered the evidence of the only witness who appeared to prove the respondents case, DW1 who testified that the applicant was terminated for poor performance which was conducted according to the company's policy. DW1 testified that the applicant being Finance and Administrator Manager his performance appraisal was based on three areas, leadership, strategies and performance excellence. That according to the performance appraisal of April, 2017, respondent was dissatisfied because applicant performed below the expected standard as a manager (Exhibit D2).

DW1 testified that they decided to terminate the applicant after were satisfied he failed to make any improvement in his performance despite the efforts undertaken to guide and instruct him how to improve his performance. That, the applicant was engaged in performance improvement plan (PIP) as reflected in Exhibit D4 and he accepted to have several meetings with his seniors (Exhibits D5 and D6). In all such efforts the applicant was willing to make some improvement in his performance according to the objectives or goals set by the respondent. However, the applicant failed to meet the standard performance required (Exhibit D8).

DW1 told the Arbitrator that despite being disappointed by the applicant's performance; he was given more other opportunities to make some improvement but did not turn positive. Hence he was warned (Exhibit D10) to improve on some areas which he failed according to the final performance appraisal conducted. Responded availed the applicant more time by extending the performance improvement plan (Exhibit D11). The applicant was subsequently terminated and paid his dues (Exhibit D12 and D13).

In my view both the respondent (employer) and Arbitrator fully complied with the requirements of Rule 17 of the Codes in determining whether a termination for poor work performance was fair. Rule 17 (1) (a) (b) (c) (d) (e) provides that:-

> "17 (1) any employer, arbitrator or judge who determines whether a termination for poor work performance is fair shall consider:-
>
> (a) Whether or not the employees failed to meet a performance standard;
>
> (b) Whether the employee was aware, or could reasonably be expected to

have been aware, of the required performance standard;

(c) Whether the performance standards are reasonable;

(d) The reasons why the employee failed to meet the standard; and

(e) Whether the employee was afforded a fair opportunity to meet the performance standard.

On the basis of the discussion above, I am satisfied that the Arbitrator considered both parties evidence and, was convinced by respondents' evidence which proved that the termination of the applicant was based on poor performance.

It is not true that arbitrator failed to consider applicant's evidence in the issue of valid reason for termination. Indeed arbitrator considered his evidence as is reflected in his award in page 9 and 10. I am in full agreement with the arbitrator position in the aspect. In his testimony during arbitration applicant, PW1, the applicant herein admitted to have been given job description. In his testimony during cross examination he testified that, the description

of what was supposed to do as a Manager of Finance and Administration was in his employment contract. He testified, I quote:-

"S. Ulikuwa unasimamia fedha na utawala?

J. Ndiyo.

S. Hivyo reference ya kusimamia fedha na utawala ulitoa wapi?

J. Kwenye Mkataba".

Applicant further testified that, he was later given job description in between March and April, 2017 which was before they started conducting performance appraisal. Thus, it is not true that he did not know what he had to do in his managerial position. The evidence reveals that he had more than 20 years' experience in that field, so no reasonable person would agree with him in such defence. In fact I would say that the applicant was aware or could reasonably expected to been aware of the required performance standards of the respondent.

In his decision Arbitrator ruled out the applicant's evidence that, the performance appraisal was conducted by ROAM Company and not the respondent. I fully agree with the finding that the respondent justified why ROAM came in. There was evidence that respondent is a

subsidiary company of ROAM and all Human Resource issues of the subsidiary companies in different countries are dealt with ROAM. The respondent proved that performance appraisal was conducted by DW1 the Chief Executive Officer, the evidence which was supported by the applicant during arbitration.

On the contention that the applicant did not know the relationship of ROAM and respondent, it was proved to be not true because he testified that in his daily functions was sending management reports to one Cyril in Switzerland and later on to Clinton in South Africa. Applicant testified that, those two persons were working with ROAM but he did not know their relationship with the respondent. With due respect that was a daylight lies of the applicant. Professional personnel like him would not be expected to say so or conduct in the way he did. No one would believe that the applicant was sending his management reports to persons whom he knew nothing about their relationship with his employer, respondent. Applicant knew very well those two seniors from ROAM and that is why he was ready to be guided and receive instruction from them or how to improve his work performance.

On the basis of the above I found the arbitrator rightly decided that the applicants' termination was on valid reasons.

On the thirdly issue, that the Arbitrator erred in law and fact by failing to consider that the applicant was not issued with a notice to terminate his contract as per employment contract, the Court will not belabor much on this because the records speaks by itself.

It is in evidence of the DW1 as well as the respondent's submission that, the employment contract had a clause which clearly stipulates how the parties were to terminate that contract. Clause 13 of the relevant contract (Exhibit D1) says:-

> "Either part to this contract may terminate the employment by notice in unity to the other party given three months prior to the date of intended termination".

Also in the same employment contract there is a clause which states it's govern law. Clause 15 of the same says:-

> "The contract shall be governed by and construed in accordance with the laws of the United Republic of Tanzania".

It is clear that the laws of the country which governs labour disputes are the labours laws.

The law provides that even where employer and employee agree that termination is to be on notice, they are bound to comply with the provisions of section 41 of the Act. Section 41 (3) of the Act provides that:-

> "Notice of termination shall be in writing, stating:-
>
> (i) The reasons for termination and
>
> (ii) The date on which the notice is given."

Also section 41 (5) is to the effect that, I quote:-

> "Instead of giving an employee notice of termination an employer may pay the employee the remuneration that the employee would have received if the employee had worked during notice period".

In this matter the respondent observed the above law governing labour disputes in the country. According to the evidence of DW1, the applicant was paid fully salary for the three months in

lieu of notice (Exhibit D14). Therefore I fully agree with the respondent's counsel submission that, the respondent complied with the terms and conditions of the employment contract between them. The respondent instead of giving the applicant three months written notice as required under section 41 (3) of the Act and clause 13 of the contract, he opted to apply section 41 (5) of the Act as clause 15 of the contract permits the respondent to pay salary in lieu of notice. In the circumstance I do not find any reason to fault the Arbitrators' finding on this issue.

As regard to the last issue that, the Arbitrator erred in law and fact by failing to consider relief sought by the applicant. I agree with both parties submission that, the only concern of the applicant was about the certificate of service, which was not awarded by the Arbitrator. As correctly submitted by the parties, such relief is a statutory one and every employee whose employment contract has been terminated is entitled to be given as is provided under section 44 (2) of the Act, which is to the effect that:-

> "S. 44 (2) - On termination, the employer shall issue to an employee a prescribed certificate of service".

Thus, on the basis of the above discussion, I find this ground has merit and the arbitrator wrongly disregarded that legal entitlement of the applicant in the award.

Under the circumstances this application is devoid of merits save that the applicant has the right to be given certificate of service as provided in law.

In the result this application partial succeeded. Respondent has to give the applicant his certificate of service as legally entitled to. Other grounds of revision I found to have no merit and they are accordingly dismissed.

It is so ordered.

I.D. Aboud

JUDGE

14/08/2020