

**IN THE HIGH COURT OF TANZANIA
LABOUR DIVISION**

AT DAR ES SALAAM

REVISION NO. 309 OF 2019

**BETWEEN
LUKINDO INTERNATIONAL CO. LTD..... APPLICANT
VERSUS
BAKARI KUSEWA..... RESPONDENT**

JUDGMENT

Date of Last Order: 17/06/2020

Date of Judgment: 13/08/2020

Z.G. Muruke, J.

Bakari Kusewa (respondent) was employed by applicant on 2011. Sometime in 2014 the directors of the respondent had noted that some supervisors had a tendency of signing in, then they go to their private matters and return in the evening for signing out. That on 01st June, 2014 the deponent decided to trace the performance of their employees, including the respondent, as a result of which they were not satisfied with the performance of the respondent hence terminated him with effect from 02nd June, 2014.

That, soon thereafter on 23rd June, 2014 the directors decided to forgive the respondent so. Thus, they cancelled the termination and called him back, which letter the respondent has acknowledged to have received on 30th June, 2014. That after receiving the said letter the respondent refused to resume duty on the ground that he had already referred a dispute to the commission.

That during the mediation stage the respondent was offered to resume duty but he refused and maintained that he had been terminated and that the letter calling him to resume duty had contained new allegations of which he was offended with and wanted the commission to decide on them too.

In deciding the dispute the arbitrator held that the applicant had failed to prove that the reason and the procedure for termination were fair. Respondent was terminated without notice, without disciplinary hearing, without being charged and without being given the right to be heard. More so, letter asking him to resume duty had contained new allegations and that, the employer did not use effectively the mediation stage. From these findings the arbitrator decided the dispute in favour of the respondent/complainant, by awarding him twelve months compensation, one month salary in lieu of annual leave, one month salary in lieu of notice and severance pay.

Being dissatisfied applicant filed present revision raising following issues:-

- (a) Whether the arbitrator has acted in the exercise of her jurisdiction illegally or with material irregularity in deciding that the reason was unfair:
 - (i) By condemning the applicant for failure to settle the dispute at the mediation stage.
 - (ii) By upholding that there was a new allegation in the letter which called the respondent to resume duty.
 - (iii) By ignoring the testimony and evidence of the applicant, which was also not denied by the respondent, that the decision to terminate the respondent was reversed and

the applicant was still waiting for the respondent to resume duty.

- (b) Whether the arbitrator has acted in the exercise of her jurisdiction illegally or with material irregularity in deciding that the procedure was unfair:
- (i) By not giving the respondent the disciplinary charges.
 - (ii) By not holding a disciplinary hearing but a mere discussion.
 - (iii) By not being given the right to representation.
- (c) From the answers to the above issues whether the arbitrator has acted in the exercise of her jurisdiction illegally or with material irregularity in maintaining that the respondent was terminated and should be paid the decided benefits.

On the date set for hearing, Stella Simkoko represented applicant, while respondent was represented by Bakari Ndeke of imperial attorneys. Hearing was by written submission. In support of the issue number one applicant counsel submitted that the arbitrator has acted in the exercise of her jurisdiction illegally or with material irregularity in deciding that the reason was unfair as the letter which called the respondent to resume duty had contained a new allegations. We strongly oppose this finding and submit that the said letter did not contain any new allegations as alleged or at all.

The respondent had testified that he did not return to work due to paragraph 2,4 and 5 of the said letter which were written as follows:

(1).....

(2) **Upewe muda wa kurekebisha utendaji wako hasa wakati masuala ya kufuatilia malipo na utendaji kazi wa wafanyakazi.**

(3).....

(4) **Muda uliokuwa nje ya kazi utakuwa ni sahemu ya livu yako ya kazi na livu hiyo itaisha tarehe 01/07/2014.**

(5) **Kuanzia sasa unatakiwa auwe mkweli katika kutoa ripoti husika**

The sentence in paragraph (2) was justified as the respondent was a supervisor. The statement in paragraph (4) was also justified as the respondent was out of duty for one month, and the statement in (5) was also justified since the respondent was a supervisor. The respondent was obliged to resume duty and seek for a meeting with the management on what the thought were the anomalies in the said letter and not to refuse to resume work and maintain that he had been terminated. Therefore the refusal by the respondent to resume duty was unjustified and the arbitrator has erred to uphold the refusal to resume work on the ground that there were new allegations.

The arbitrator also erred in law and in fact in ignoring the testimony and evidence of the applicant's witness who testified that the respondent was called to resume duty but he refused, while even the respondent did not deny that he had received the letter calling him to resume duty. **The arbitrator should have ordered the respondent to resume duty and then to lodge his complaints about the letter to the management, and not to maintain that he had been terminated**

while the applicant had already cancelled the termination and called him to resume working.

While most terminated employees fight for years in order to be reinstated/their termination to be cancelled, what is mostly astonishing is that the respondent refused to resume working and kept arguing that he had been terminated. It is doubtful if his refusal was out of utmost good faith. We humbly submit that the respondent aims to unjustly enrich himself at the expense of the applicant. The arbitrator erred in fact and in law in deciding that the procedure was unfair as the respondent was not given the disciplinary charges, no disciplinary hearing was held and that he was not given the right to representation.

Respondent on the other hand, submitted that respondent was terminated without being given chance to defend himself in disciplinary hearing. He was not given formal charge so that he could respond. In a termination letter exhibit LU 1, effective 1st June, 2019, applicant alleged that respondent is not compatible with the company when said:-

Tumetafakari utendaji wako kazini na kuonekana haukidhi matakwa ya kampuni.

Simple translation, application alleged performance and incompatibility. However, on 30th June, 2014 applicant called respondent to resume work. Respondent insisted that, it was not a letter but a new charge because the call back letter, said he will be under scrutiny until he proves to be a better person. In totality respondent insisted what he claimed at CMA and granted. To the respondent, the revision has no merits.

Having heard both parties' submission, gone through CMA records and records of this court issue before me are.

- (i) Whether applicant followed procedure.
- (ii) Whether applicant's letter calling back respondent's work amounted to charges.

According to the records and evidence not only of respondent but applicant witnesses DW1 and DW2 proved that procedure for termination was not followed. Starting with the 1st issue for determination. It is a principle of law that termination of employment must be on valid and fair reasons and procedure. For termination to be considered fair, it should be based on valid reasons and fair procedures. There must be substantive and procedural fairness of termination of employment as provided for in **Section 37(2) of the Employment and Labour Relations Act, No. 6 of 2004** which states that:-

"Section 37 (2) A termination of employment by an employer is unfair if the employer fails to prove-

- (a) that the **reason for the 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.**"*
[Emphasis is mine].

In the case of **Tanzania Revenue Authority Vs. Andrew Mapunda**, Labour Rev. No. 104 of 2014, Aboud J. held that:-

- "(i) It is the established principle that, for the termination of employment to be considered fair it should be based on

valid reason and fair procedure. In other words there must be substantive fairness and procedural fairness of termination of employment, Section 37(2) of the Act.

- (iii) I have no doubt that the intention of the legislature is to require employers to terminate employees only basing on valid reasons and not their will or whims."

In regard to the second issue of procedure for termination, Rule 13 of the Code, provides for procedure for termination of an employees. Which amongst others, it requires investigation to be carried out, hearing to be conducted and finalized within a reasonable time and chaired by a sufficiently senior management representative who shall have been involved in the circumstances giving rise to the case. If the Disciplinary Committee finds the employee guilty, he shall give his mitigation factor, employer may make its decision, reasons thereto and explain the right of appeal to the employee.

There is no dispute that respondent received a letter calling him back to work. While being cross examined by applicant counsel at page 50 of the CMA typed proceedings he said.

S: Kwa nini hukurudi kazini ulipoambiwa urudi.

J: Barua ya kuniachisha kazi ilikuwa ni tuhuma ambazo sio za kweli.

S: Huoni ulipaswa mkayazungumza

J: Mgogoro ulikuwa Tume hivyo niliacha Tume ifanye kazi yake.

From the above question and answer it is clear that, respondent did not want to go back to work after applicant called him back. If there was any issue, then it should have been discussed. What applicant did, to

recall back respondent is an act of reducing dispute and create harmonious relationship between employer and employee, that should have been taken positively by respondent. The fact that, he filed dispute at CMA does not prevent parties from reverting back to their original position, before filing a dispute. Applicant action suppose to be commended not to be condemned. Dispute are filed once there is serious need. Otherwise, if employer and employee agree to resolve their dispute on their own, it is better to the consumer of justice and parties at large. Dispute are entertained whenever, there are no solution available. To this court, respondent to insist dispute while employer has withdrawn the letter of termination is an justified. Respondent himself has submitted at paragraph two in page 2 of his submission that the termination was really a surprise to him. If it was a surprise to him why did he refuse to resume working? Respondent also submitted that the letter calling him to resume working had contained a new charge, which position the applicant denied during the hearing, and even if it is taken that the said letter had contained a new charge how was he sure that he would not have had the chance to defend himself against it upon returning back to work instead of refusing to resume work and insisting he had been unfairly terminated?

Respondent believed he was not an habitual offender (which was the position of the employer in calling him back to work) why did he refuse to resume working?

Assuming there were charges, which is denied, yet, respondent had an opportunity to disprove the same bearing in mind he was not given chance to defend himself. I have noted with concern reluctance of

respondent to go back and work with applicant. Respondent seem to be not interest. Since applicant did not follow the procedure, in terminating respondent, then, the award issued by CMA is justified in the circumstances of this case, despite size and number of employee available reasonable step should have been taken although not in the checklist form. Thus, revision application lacks merits. Accordingly dismissed.

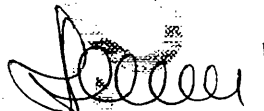


Z.G. Muruke

JUDGE

13/08/2020

Judgment delivered in the absence of applicant and in the presence of the respondent.



Z.G. Muruke

JUDGE

13/08/2020