IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[IN THE DISTRICT REGISTRY]

AT ARUSHA

LABOUR REVISION NO. 83 OF 2018

(C/F Labour Dispute No. CMA/ARS/ARB/56/2017)

WARRIOR SECURITY LTD...APPLICANT

Versus

ATHUMANI MWANGI...RESPONDENT

JUDGMENT

15/10/2020 & 26/11/2020

MZUNA, J.:

In this application, Warrior Security Ltd, the applicant herein is challenging the award of Tshs 4,200,000/- remuneration (being 12 months salaries at the monthly rate of Tshs 350,000/-) issued by the Commission for Mediation and Arbitration of Arusha (hereafter the CMA) in favour of Athuman Mwangi, the respondent herein.

As a matter of fact, the respondent was employed by the applicant as a security guard on 28Th November, 2008. He was later on promoted to a Field officer position. On 18Th December, 2016, he committed a misconduct involving the misuse of a motor cycle, an employer's property which was out of the prescribed schedule. The respondent admitted the offence and

subsequently thereafter, a disciplinary hearing was conducted which recommended termination of the respondent.

Before the CMA, in Labour Disputed No. CMA/ARS/ARB/56/2017 the respondent asked for reinstatement. The CMA found that there were no valid and fair reasons for termination though there were fair procedure. The CMA proceeded to order for payment of 12 months' remuneration.

This prompted the present revision application in which Mr. Sindato Alphey Shao, learned counsel and Ms. Aisha Masoud, personal representative, appeared for the applicant and respondent respectively. Hearing proceeded by way of written submissions and parties filed their respective submissions save for the rejoinder. The application is supported by an affidavit sworn by Mr. Dixon Malaki, the applicant's Human Resource Officer. The filed affidavit contain two legal issues:-

1. *That the arbitrator erred in law by not analyzing the evidence on record with regard to the reason for terminating the respondent.*
2. *That the arbitrator misdirected himself as to the legal position in so far as termination is concerned under the Employment and Labour Relations Act.*

There is also a filed counter-affidavit of the respondent opposing the application.

The main issue(s) are whether the termination was substantively and procedurally fair. Lastly whether the awarded compensation was legally valid in law?

Mr. Shao is of the view that the evidence was not considered because according to him, the legal procedures for termination were duly followed but the arbitrator overlooked the law and evidence. For instance, he says, the Arbitrator ignored to admit Exhibit D1 and D2 being the warning letter and an apology letter respectively allegedly that the former was not signed by the respondent while the latter was not addressed to anyone. The learned counsel referred this court to the provisions of Rule 11 (5) of the Employment and Labour Relations Act (Code of Good Practice) Rules, GN No. 42 of 2007 (herein after the Code of Good Practice).

He said that the respondent on the 18th December, 2016 committed a similar offence of using the company property for his own gain without seeking permission from the applicant which ultimately prompted the applicant to issue a warning letter because it was not his first offence.

The learned counsel said further that Rule 12 (2) of the Code of Good Practice, provides that the first offence cannot attract termination unless the misconduct is so serious that it makes the continued employment relationship intolerable. That taking into account the nature of the job and that the respondent committed the second offence, in view of the provisions of Rule 12 (4) (a) of the Code of Good Practice, the termination was an appropriate sanction because the two offences were committed in one month. It was his view that there were valid reasons and fair procedure for termination and therefore the award should be set aside.

In reply, Ms. Masoud submitted that CMA considered all material evidence adduced by the parties. She further argued that there was no proof of signing a warning letter (exhibit D2) by the respondent. Further that even the apology letter (exhibit D1) does not show to whom it was directed to. She invited the court to dismiss the application for want of merits.

Having considered the submissions by the parties in line with the CMA record, it is indisputable fact that the respondent was terminated after violating applicant's motor cycle use policy. In that he used the same without permission for his own gains. There is clear admission of the said

offence by the respondent. Under section 37 (2) (a) (b) (i) of the Employment and Labour Relations Act, No. 6 of 2004 (hereafter Act No. 6 of 2004) read together with Rule 9 (4) & (5) of the Code of Good Practice, it emphasizes that in termination of employment one has to comply with both substantive and procedural requirements. In other words, there must be a valid and fair reason as well as a fair procedure for a fair termination.

The dispute has been on exhibit D1 tendered by DW1 Gideon Eliakim being an apology letter as well as a warning letter Exhibit D2 dated 24/12/2016. The witness said that a disciplinary committee hearing was conducted and the respondent did attend. The said committee form was admitted as exhibit D3. The respondent admitted the offence and was subsequently terminated for disciplinary misconduct. Though the respondent Athuman Mohamed Mwangi (PW1) denied to have committed the alleged misconduct, he however said had no prior permission from the Branch Manager. He further admitted that is so doing (that is misuse of the motor cycle), was endangering the employer's property.

Based on the evidence of DW1, the applicant's security guards' supervisor and in-charge of watchmen, and the tendered exhibits, it leaves no doubt that the respondent misused the motor cycle, a fact which was

dmitted by the respondent. That being the case, there was proof of ıisconduct which forms part of valid and fair reasons for termination under .ules 11 (1) and 12 (1) (a) & (d) of the Code of Good Practice. If ıisconduct is proved as in our case, it constitutes a valid and fair reason ɔr termination. This was held by this court in the case of **Patricia M. :wagatare v Dorcas Albert Minja** Lab. Div., DSM, Rev. No. 272 of 009, 06/06/2011 reported in Labour Court Digest 2011-2012 P. 63.

What was not proved was the allegation by DW1 that the respondent ommitted misconduct twice, that is 23/12/2016 and 16/01/2017 and or ıat he was previously warned verbally. The record shows that there was ;sued a warning latter (*exhibit D2*) on 24th December, 2016. That is the ınly warning on record. The allegation that there were no valid reasons for ɜrmination by the Arbitrator is without any basis. It is remarked on page 7 ıf the award that:-

> *"...Tume inaona kwamba mlalamikiwa hakuwa na sababu za msingi lakini alizingatia utaratibu sahıhi na wa haki kabla ya kumwachisha kazi mlalamıkaji..."*

This, with due respect, is an absolutely wrong analysis of the evidence and conclusion. I say so because, on page 5 it was found that there is evidence of misconduct by admission of the respondent himself.

There was therefore both valid reasons as well as fair procedure in his termination not as alleged in the finding of the arbitrator and CMA Form No. 1. Although he was a first offender, termination was an inevitable punishment. It was held in the case of **Edna Robert v Tanzania Revenue Authority,** Lab. Div., DSM, Rev. No. 282 of 2009, reported in Labour Court Digest, 2011 at page 22, the position I agree, that:-

> *"Although a first offence of misconduct under Rule 12 (2) shouldn't justify termination however under the same law, Rule 12(3) the act may justify termination in certain circumstances."*

Therefore, I hold that termination of the respondent was substantively and procedurally fair in view of section 37 (2) (a) (b) and (c) of the Act No. 6 of 2004. There was gross dishonest which was intolerable.

Now on <u>the reliefs.</u> The arbitrator awarded compensation of 12 months based on the reasons that the respondent had worked to the applicant's employment since 2008 with unblemished record and that a simple warning could have meted out the punishment not necessarily the

termination. I have a different view. In deciding this issue, I am guided by the case of **G.4 Security Services (T) Ltd v. Peter Mwakipesile,** Labour Revision No. 109 of 2011 in Labour Court Digest, 2013 (Rweyemamu, J as she then was) held that:-

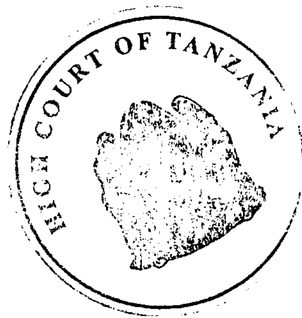
> *"In deciding gravity of a particular misconduct, one has to bear in mind the type of the employer's business and* ***the importance of honest in the said business..."*** [Emphasis added]

I agree entirely with that holding. The nature of the applicants' work is security service. The respondent was untrustworthy in a sensitive organization like that one. He also misused the employer's property for his own gain, which calls for a severe punishment. Of course, practice has always been consistence in the application of the punishment. The CMA was not addressed on the sanction imposed for other employees who committed similar offences. So, I would confirm termination with payment of compensation for six months only for the reasons above stated.

That said and done, the award issued by the CMA is hereby revised and set aside and substituted thereof one of compensation for six months

remuneration (that is Tshs 2,100,000/- only) and a clean certificate o service.

Application is partly allowed with no order for costs.



M. G. MZUNA,

JUDGE.

26. 11. 2020