

IN THE HIGH COURT OF TANZANIA
LABOUR DIVISION
AT MOROGORO

REVISION NO. 27 OF 2019

BETWEEN

SAMSON KAPONGO APPLICANT

VERSUS

CHIEF EXECUTIVE OFFICER, TTCL RESPONDENT

JUDGMENT

Date of Last Order: 27/02/2020

Date of Judgment: 04/03/2020

S.A.N. Wambura, J.

Aggrieved by the award of the Commission for Mediation and Arbitration [herein after to be referred to as CMA] dated 30/06/2015 the applicant **SAMSON KAPONGO** has filed this application under the provisions of Sections 91(1)(a), (2)(b)(c) and 94(1)(b)(i) of the Employment and Labour Relations Act No. 6 of 2004 [herein after to be referred to as ELRA] and Rules 24(1), (2)(a)(b)(c)(d)(e)(f), (3)(a)(b)(c)(d) and 28(1)(c)(d)(e) of the Labour Court Rules, 2007 GN No. 106 of 2007 praying for the Orders that:-

- (i). *This Honourable Court be pleased to revise and set aside the award of the Commission for Mediation and Arbitration dated 30th June, 2015 in Labour Dispute No. RF/CMA/MOR/24/2011.*
- (ii). *Any other relief this Honourable Court may deem fit, just and equitable to grant.*

The application is supported by his sworn affidavit.

Mr. Henry Mtahiko the Senior Human Resource Officer of the respondent **CHIEF EXECUTIVE OFFICER, TTCL** swore a counter affidavit challenging the application.

A brief background of this matter is that the applicant was employed by the respondent as a Post Officer Trainee II in 1986. After being promoted his salary was raised to Tshs. 640,012/= . On 15/06/2006 he was terminated on the allegations that he contravened Items (g) and (h) of the Second Schedule to the Security of Employment Act Cap. 387 RE. 2002 [herein after to be referred to as SEA] which provides that:-

"(g) willfully damages, misuses or misappropriates buildings, machinery, raw materials, other property or tools or any object used in connection with his work;

(h) neglects or fails to carry out his duties so as to endanger himself or others or property or neglects or fails to Comply with any instructions relating to safety or welfare.”

On 09/08/2006 he was arrested by the Police. After three days he was released on bail. He thus filed an appeal to the Conciliation Board. However the Board did not rule on his appeal for the reason that it will be waiting for the criminal matter which had by then been taking to Court to be finalized. This is per Exhibit M8. On 13/11/2005 he was paid his terminal benefits.

The criminal charges stayed pending in Court for four (4) years. On 28/12/2009 the respondent was acquitted of the criminal charges. The respondent refused to reengage him on allegation that they had terminated him before the criminal matter was filed in Court.

Dissatisfied he filed his complaint at CMA which was by virtue of Section 42 of ELRA as amended by Section 13(3) of the 3rd Schedule of Miscellaneous Amendment's No. 2 of 2010 was replacing the Conciliation Board. It provides as herein quoted:-

"Section 13(3) The Commission shall have powers to Mediate and Arbitrate all disputes originating from the repealed laws brought before the commission by the labour commissioner and all such disputes shall be deemed to have been duly instituted under Section 86 of the Act."

Having been entrusted to take over the duties of the Conciliation Board, CMA found in favour of the respondent and dismissed the claims.

Aggrieved by CMA's award the applicant has now knocked at the doors of this Court seeking to have the award revised.

At the hearing of this matter the applicant was represented by Mr. Dedan Kapongo, his Personal Representative, who submitted that the procedures for terminating the applicant were not adhered to. That the respondent issued a notice and called a meeting with the Workers Committee as seen in Exhibit M5. As they did not agree on the same, and the respondent had filed an appeal, then the decision to terminate him had to be stayed.

That it is on record the applicant filed the appeal [Exhibit PW6] within time.

While awaiting for the Board's decision the respondent had also sent complaints to the Police [Exhibit PW7] who charged the applicant of a criminal offence. Since there was a criminal charge pending in the Resident Magistrate's Court of Morogoro, the appeal to the Conciliation Board had to be stayed. This was as per Section 30 of SEA.

It was his submission that in the circumstances, termination was not finalized due to the criminal case which was pending in Court for five (5) years whereby the applicant was later acquitted.

That when the applicant was acquitted of the criminal charges he informed his employer so that he could be reinstated. The employer refused arguing that he was terminated before he was charged of the criminal offence which was not true.

That CMA erroneously raised the said issues but the procedures were not adhered to as stated in paragraphs 4:5 and 4:6 of the supporting affidavit.

In paragraph 4:6 of the affidavit it was alleged that the Arbitrator argued that Items G and H were the reasons for terminating the applicant. It was stated in the evidence that he used a password to move/collect money. That the charges and evidence adduced were very different and yet the Arbitrator found in favour of the respondent.

It was his submission that apart from stating what was adduced in Court the evidence did not prove the charges facing the applicant.

He argued that the reason for termination was thus not valid.

Mr. Kapongo prayed to withdraw the allegation in paragraph (4.8) of the affidavit that the Arbitrator did not award terminal benefits and prayed to add that the award was procured out of the prescribed time being six (6) months late but the Arbitrator did not state the reasons for the delay.

He thus prayed that the award be set aside and this Court finds that the applicant was unfairly terminated and the applicant be reinstated and get all his rights as if he is still in employment to date.

In reply Mr. Emmanuel Mkonyi Advocate who represented the respondent submitted that they believe that the procedure was followed. The applicant was terminated on 16/06/2006 (Exhibit M5). He appeal to

the Board on 22/06/2006 (Exhibit M6). By the time he appealed he had already been terminated so Section 22(1)(2) and (3) of SEA cannot come into place.

As for the criminal charges (Exhibit M4) it is dated 09/08/2006. So the provisions of Section 30(1) of SEA, cannot be used as the applicant had already been terminated when he was charged. It would have been in force if the applicant would have been in service. The notice was sent to the Police after he had been terminated.

That according to Section 30(2) of SEA, an employee cannot be charged by the employer. By the time he won the criminal charges he had already been terminated so cannot gain from the said provision.

The Employment Act Cap. 366 RE. 2002 defines an employee to be anyone working for an employer (Section 2). For the Section to be in use there has to be an existing contract of employment. When the applicant was charged of the criminal offence he was no longer an employee of the respondent.

It has been submitted that the charges were not proved in the evidence adduced. However, the applicant had two passwords which he

used making the employer believe that the bills were paid (Tshs. 30,000,000/=). He was saying the bill had been paid while it was not true thus endangering his life by use of his password because he did not keep his password securely. This allowed people to enter the system.

Mr. Mkonyi believed that the evidence therein adduced was proper, and the Arbitrator's award was properly secured.

He further submitted that the applicant's Counsel has argued that the award was delivered out of time and no reason was adduced for the delay. Those were submissions from the bar and cannot be considered as they did not follow the right procedure.

That the applicant prayed to be reinstated which is impossible. The award was properly procured according to the laws of the contrary [SEA].

He thus prayed that CMA's award be upheld.

In rejoinder Mr. Kapongo submitted that Section 22 cannot be used but Section 22(2) is applicable in this matter as the procedure does not come to an end where there is an appeal as also stated in Section 30 of SEA, and the Conciliation Board acknowledged the same.

That they had proved the case. Since they did not adduce any evidence to that effect, the allegation was not proved.

That he had just noted that the award was delivered out of time so prayed that it is accepted.

He thus prayed that the award of CMA be revised.

From the above submissions, I believe that this Court has to resolve the following issues:-

- (i). Whether the award was procured out of the prescribed time.
- (ii). Whether or not the respondent had a valid reason for terminating the applicant.
- (iii). Whether or not the respondent adhered to the procedures in terminating the applicant.
- (iv). The reliefs which each party is entitled to.

1. Was the award procured out of the prescribed time?

I believe I need not labour much on this issue which was orally raised by Mr. Kapongo at the hearing. The award was delivered sometime in June, 2015. They had a copy of the same and had not noted/raised the issue while filing the application to have the matter revised. As rightly

submitted by Mr. Mkonyi the same cannot be entertained by being brought behind the doors even if the same is true. Therefore, I will proceed to resolve other issues herein raised.

2. Did the respondent have a valid reason for terminating the applicant?

According to Exhibit M2 dated 10/03/2004 and Exhibit M5 (Ref. No. 26977) dated 06/06/2006 (Ref. No. 26977) the applicant was terminated because he contravened the Items (g) and (h) of the second schedule of SEA. In adducing evidence at CMA it was alleged it was because he had two passwords in which one was being used to enter fictitious on line receipts after working hours subjecting the Company to a loss of its revenue amounting to Tshs. 31,910,918/65. He was to respond to the same on 11/03/2004 at the close of business. On the same day COTWU was notified of the intention to terminate him as per Exhibit M3.

On 12/03/2004 he was suspended from duty with his full salary as per Exhibit M2 dated 12/03/2004. The respondent received a copy of the same on 18/04/2004 while on suspension.

On 21/04/2004 COTWU proposed to meet with the Management (Exhibit M4). After the said meeting by a letter dated 16/05/2006, COTWU challenged the intention of terminating the applicant (Exhibit M5) as they found that the applicant was not guilty of the offence charged with. COTWU instead proposed that the applicant be included in the retrenchment exercise which was going on. This was because the respondent had lost the trust of the applicant. However on 15/06/2006 the applicant was served with a letter for termination dated 06/06/2006.

According to Section 39 of ELRA the respondent has the duty to prove that termination was fair.

Now we have two contradictory allegations in this matter; misuse of the applicants password and contravention of Item (g) and (h) of the 2nd schedule to the SEA. I join hands with the finding of COTWU that it was not proved that the applicant used his password to issue the said receipts. As stated by Mr. Mkonyi at the hearing of this application, that the applicant was merely negligent in keeping his password thus allowing people to enter the system, then the respondent did not have a valid reason for terminating the applicant. They could have been simply warned the applicant or taken other less punitive measures for that matter.

But again it is also in record that the applicant was criminally charged of theft of the alleged monies but he was acquitted of the charges. It is not on record that there was an appeal preferred. This goes to cement the fact that there was no valid reason for terminating the applicant.

3. Did the respondent adhere to the procedures in terminating the applicant?

I would say the respondent somehow adhered to the procedures up to when he notified COTWU of his intention to terminate the applicant and agreed to meet with them. The respondent however, did not give sufficient time to the applicant to prepare his defence and did not heed to the suggestions from COTWU but proceeded to terminate the applicant.

Dissatisfied the applicant appealed to the Conciliation Board on 21/06/2006 (Exhibit M6) as per Section 23 of SEA. But the Conciliation Board decided to stay the proceedings due to the criminal charges against the applicant filed in Court on 09/08/2006 (Exhibit M7) until the charges were finalized. This response was issued vide a letter dated 12/12/2006 (Exhibit M8).

The criminal charges stayed pending in Court for some three (3) years. Judgment was delivered on 28/12/2009 whereby the applicant was acquitted. It is not on record as to whether the Republic appealed against the judgment or not.

However, when the applicant sought to be reinstated, the respondent refused arguing that they had terminated him before he was charged of the criminal offence.

It is at this juncture that I again believe that the proceedings were vitiated. This is because before the criminal charges were pressed, the applicant had appealed to the Conciliation Board. The Board stayed hearing of the appeal pending finalization of the criminal charge. This is because the Board found the offences which the applicant was facing in Court were similar to the ones he was accused of by the respondent. CMA found that they were two different charges and so held that the procedures were properly adhered to. I have a different opinion on these findings.

It is worth reminding ourselves that the applicants appeal had not been heard by the Conciliation Board therefore the decision of the Board was yet to be made known.

According to Section 42 of ELRA as amended by Section 13(5) of Miscellaneous Amendments No. 2/2010 it was CMA which stepped into the shoes of the Conciliation Board. Therefore the applicants appeal was actually determined on 30/06/2015. So the applicant was actually terminated on 30/06/2015 by CMA and not before the criminal charges were allegedly filed in Court.

Therefore the procedures which were allegedly adhered to were not fully finalized by the respondent.

4. Reliefs entitled to both parties.

I note that the applicant is claiming to be reinstated or compensated for the unlawful termination.

It is on record that the applicant was paid his terminal benefits in November, 2006 when his appeal was still pending at the Conciliation Board. That the Board did not hear the appeal due to the criminal charges which the applicant was facing at the instance of the respondent. In the circumstances, the respondent did so to avoid being said to have charged the applicant of the same offence twice contrary to Section 29 of SEA. But

that remains to be the reality. That was why even the Conciliation Board was constrained to hear the applicants' appeal.

It is my finding therefore that the applicant ought to be reengaged as the respondent did not have a valid reason for terminating him. The applicant therefore is entitled to his full salary as of July, 2006 to May, 2010 when the respondent refused to reinstate him. Since it is long time and the relationship has obviously soured apart from the fact that the post must have been filled by now, the applicant cannot be reengaged but just paid the said salaries.

It is on record that the applicant was receiving a salary of Tshs. 645,012/= per month at the time of termination so he ought to be paid Tshs. $645,012 \times 42 \text{ months} = \text{Tshs. } 27,090,504/=$.

The period of June, 2010 to June, 2015 when the matter was finalized at CMA is deducted as the same was awaiting the amendment of the law and the respondent cannot be held liable.

The respondent will also not have to pay the applicant as of July, 2015 to date as it was the applicant himself who was filing incompetent applications and the respondent cannot be held liable for the same to.

Apart from the unpaid salaries for the period which he was out of office, I believe the applicant is also entitled to be paid statutory compensation as provided for under Section 35 (a) and (b) of SEA. Applicant ought to be paid repatriation costs as they were not paid when he was terminated as evidenced in Exhibit R11.

Having found that the application has merit, it is herein granted in the terms stated above. The award of CMA is revised and set aside.

S.A.N. Wampura
JUDGE
04/03/2020