IN THE HIGH COURT OF TANZANIA
LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 197 OF 2019

GSM TANZANIA LIMITED.....APPLICANT
VERSUS
IDD M. KITAMBI.....RESPONDENT

JUDGMENT

Date of last Order: 02/11/2020
Date of Judgment: 30/11/2020
Z.G.Muruke, J.

Respondent Idd M. Kitambi was terminated following being charged and found guilty of Misuse of employer computer system of his section, insubordination to his leaders and using unauthorized language at the working place.

Being dissatisfied he filed dispute at CMA, that was decided on his favour. Same dissatisfied applicant, thus present revision, supported by an affidavit of Fauzia Hussein her Principle Officer. At paragraph 7 of affidavit in support of the application revels (12) twelve issues for determination by this court. In essence at paragraph 8 of affidavit in support of the application, one major issue raised is failure by arbitrator to comprehend the interpretation of termination of a permanent employment of unspecified contract period and Rule 8(2)(a) and 8(2)(b) of GN 42/2017 which provides for termination of a fixed time employment contract.

After conclusion of pleadings, and on the date set for hearing, Ibrahim Shineni represented applicant, while Hemedi Omari represented

respondent, by consent hearing was ordered to be by way of written submission.

Applicant counsel submitted that, the applicant is challenging the said award on the reasons that the arbitrator was bias and the award was improperly procured hence it was illogical and unlawful. The arbitrator was bias on face of record as was swayed by irrelevant considerations and did not stick on the judicial approach as evidence at page 4 and page 5 of the award respectively. In her testimony, DW1 evidenced in the commission that the employment of the respondent was on permanent bases that is why the respondent applied and secured a personal loan under the recommendation of the applicant same are reproduced as follows:-

At page 4

"Employee is given loan in a bank because of the permanent work relationship with his employer"

Page 5

"PW1 said that he realized he has a permanent contract when the bank needed his employer's details and he was under contract to work in any position at GSM"

It is clearly seen without hesitation that the respondent employment status changed from a two year contract to a permanent contract to suit the bank requirement for the respondent to secure a loan in which the employer was the guarantor. It was evidenced by DW1 that the employment of the respondent was a permanent one while during his testimony the respondent again joined hand with the applicant saying that the bank details of his employment were on permanent employment which he did not dispute.

On the analysis above, the holding of the arbitrator that the employer terminated a fixed term contract and hence should pay the respondent the remaining months of his last fixed contract which is sixteen months is illogical and unlawful. The respondent was serving a permanent contract, his fixed term contract was changed and he was the respondent himself who submitted to the bank a letter from the applicant evidencing that he was employed on permanent contract so as to meet the requirement of the bank to secure a loan and he successfully secured the said loan.

The law is very clear, once it is established that permanent employment is unfairly terminated like this of the respondent, the reliefs claimed are found under Section 40 of the Employment and Labour Relations Act Cap 336 by either to reinstate, to re-engage and or paying a compensation not less than 12 months remuneration and not payment of the remaining period for the expire term as illogically decided by the arbitrator by failure to analyse the testimony before the trial commission.

The arbitrator failed to address and decide on issues framed during the trial, instead dealt and decided on nature of the employment contract of the respondent, while there was no any issue framed over the said matter. The issue framed were whether there was a fair reason for complainant's termination, whether the procedures were followed; reliefs to both parties and whether the complainant was embarrassed during his employment. The decision of the arbitrator was not engulfed on any of the above issues framed contrary to the legal requirement, and proceeded to frame another issue that whether the employment of the respondent was on fixed term or permanent. The award issued by arbitrator on 30th January, 2020 is

unlawful, illogical and irrational as it was delivered against the proceedings during the hearing and issues framed.

The holding that the respondent was employed on a fixed terms and not on permanent bases goes unheard between the parties and ultimately led a miscarriage of justice on the part of the applicant.

On the other hand respondent representative submitted that:- the act of the applicant to terminate respondent on 10th May, 2018 was unlawful in both substantive part and procedural part. The reasons considered by the applicant to terminate the respondent were not well established, nevertheless the applicant never established the sufficient grounds against termination and failed to adduced the same before disciplinary committee.

No evidence has been either adduced in the disciplinary hearing supporting allegation to the charge sheet against the respondent and the same happened before the Commission for Mediation and Arbitration and thus the respondent has no option rather to join hand with the learned arbitrator from the Commission for Mediation and Arbitration (CMA) in finding that the reasons for termination was unfair though the procedure was followed. Therefore made the whole act of termination to be unfair.

The respondent never committed any misconduct against the applicant, the applicant failed to prove all allegation against the respondent and admitted arbitration proceeding that, it was AZIZA (who has been mentioned in the disciplinary hearing form)who changed the production and supply system after being ordered by the production Manager, and it was BONIFACE (the product Manager) who gave an order to change the

production and supply system in which paved a way to root of the main allegation against respondent.

The award delivered by the Hon. Mbena, M (Arbitrator) in the labour dispute No. CMA/DSM/KIN/R.592/18/167 complied with all requirement of the good and proper arbitral award. The contents of the said award include introductory material facts, analysis of the evidence from the both parties, legal issues, provisions of law relied to and precedent e.t.c. In making the story short, the learned arbitrator focused decision on the issue framed by both parties, in the assistance of the arbitrator and not otherwise as claimed by the applicant.

Having heard both parties submission the issue before me are three.

(i) Whether respondent has fixed term contract.

(ii) Whether respondent committed misconduct alleged

(iii) Whether procedure was followed

On the issue number one, as to whether respondent was working under fixed term contract or was permanently employed is rightly answered by respondent own evidence as seen at page 16 of CMA typed proceedings while being cross examined by applicant counsel then, respondent at CMA as follows:-

S: Wakati gani ulifahamu mkataba wako ni wa kudumu.

J: Baada ya benki kuhitaji details zangu kutoka kwa mwajiri.

S: Kulikuwa na shida yoyote katika ufanyaji wako wa kazi?

J: Hakuna shida na nilipata mkopo wa Benki

S: Baada ya kukubali mkataba maada ulikuwa tayari kufanya kazi yoyote utakayopewa na mwajiri.

J: Ndiyo

From the evidence above in form of question and answer against respondent on his own evidence prove that, he was under permanent contract at the time of termination, and more so, having accepted to do any job that will be assigned by applicant. Thus, finding by arbitrator that respondent was under contract for specified time which is two years is not based on evidence not only of applicant witnesses, but also respondent himself as reproduced above.

On the second issue whether respondent termination was justifiable. To answer the issue, court refers the respondent list of documents to be relied by the applicant by then at CMA filed on 15th October, 2018, annexure IMK 7, hearing form on 10th April, 2018, titled Employee response. It was respondent defense to allegations of misconduct complained by the applicant at disciplinary hearing. Same is reproduced as follows.

Kuhusu Insubordination:

> Sikuona msingi wa kujibu email ya tarehe 26/03/2018. Kwani nilishaeleza mara nyingi swala hili. There was no ground for me to respond. Najua nilikuwa nijibu ndani ya masaa /saa 48.

Kuhusu indecent language

> "Lugha chafu"
>
> Naomba aliyeathirika na maneno yangu aje mbele ya kamati. Siku ya 26 Machi, 2018 nilijaribu kuingia kwenye System nikashindwa. Na kwa hiyo nikamwambia Irene kuwa aliyenitoa basi amalizie hiyo kazi. Waitwe Ponsian, Salum, Aziza na Bon.

The above were evidence adduced during defense hearing at disciplinary hearing on 10th April, 2018. Same were documents to be relied

by respondent then applicant at CMA filed on 15th October, 2018 that was received during hearing at CMA as exhibit G4 hearing form tendered by DW1 Fauzia Hussein.

Equally, in her evidence at CMA DW1 Fauzi Hussein at page 5 to 7 of CMA typed proceedings she said.

> Mlalamikaji alituhumiwa kwa utovu wa nidhamu na matumizi mabaya ya mfumo wa kazi SPA, kuonyesha dharau kubwa kwa uongozi na matumizi ya lugha mbaya eneo la kazi, baadaye kikao cha nidhamu ambacho kilipendekeza mlalamikaji afukuzwe kazi.

S: Taratibu gani mlifuata.

J: Tulimwandikia email atolee maelezo kuhusu hizo tuhuma lakini hakujibu hiyo email. Tulikumbusha tena bado hakujibu, ilibidi nimwite ofisini alisema hana haja ya kujibu emails wala kujibu hizo tuhuma. Refused Emails that respondent refused to replay was received as exhibit G1 CMA.

From the evidence of DW1 above and respondent response during disciplinary hearing refusing to answer email on the issue complained by applicant proves insubordination. Respondent admitted to have refused to reply e-mail. According to DW1, he was called to the office yet, he refused and said he will not replay, as there is no need. From the evidence, offence of insurbodination was proved as against respondent. However, there is no evidence to prove interfering with system as alleged by applicant at disciplinary hearing or at CMA. Sub issue to be resolved in this case is whether insubordination done by applicant can warrant termination. According to Rule 12(3) of Employment and Labour Relations Code of Good Practice GN number 42/2007, the acts that may justify termination are:-

(a) Gross dishonest

(b) Wilful damage to properly

(c) Wilful endangering the safety of others

(d) Gross negligence

(e) Assault on a co-employee, supplier, customer, or member of the family of and any person associated with, the employer and

(f) Gross insubordination

Arbitrator views that it is mere insubordination and that he is first offender not backed up by CMA records. There is no any mitigation raised by respondent at disciplinary hearing conducted by applicant that could have moved applicant to give him a warning as proposed by arbitrator.

From the Rule above reproduced, respondent was found guilty of insubordination following his own evidence in admission and evidence of DW1 Fauzia Hussein. At the disciplinary hearing respondent was charge for among others Gross Misconduct by refusing to replay to the allegations emailed to him on 26th March, 2018, while presenting un acceptable behavior and indecent language to DW1 Fauzia Hussein when he called him to find why he has not replied emails sent to him. To this court this is serious offence of gross insubordination, mentioned on Rule 12(3)(f) of the Employment and Labour Relations Code of Good Practice GN 42/2007.

Discipline at work is very essential for orderly administration of day to day operations at work place. To the contrary, affects productivity and advancement of industries and economy of the country at large. On those circumstances, arbitrator award of 16 months' salary for remained period of respondent employment is quashed and set aside as the respondent was permanently employed. Respondent termination is justified, for gross

insurbodination and having followed, all the requisite procedure in terms of Exhibit G1-G9 tendered by DW1. Respondent to be paid statutory benefit if not paid.

Z.G.Muruke

JUDGE

30/11/2020

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VERSUS

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Date: 30/11/2020

Coram: Hon. S.R. Ding'ohi, DR.

Applicant:
For Applicant: Mr. Ibrahim Shinene, Advocate

Respondent:
For Respondent: Mr. Hemedi Omari, Personal Representative

CC: Halima

Court: Judgment delivered this 30th day of November, 2020.

S.R. Ding'ohi
DEPUTY REGISTRAR
30/11/2020