IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 260 OF 2019

BETWEEN

CI GROUP MARKETING SOLUTION..... APPLICANT

VERSUS

SHABAN SEMTAWA AND ANOTHER..... RESPONDENTS

JUDGEMENT

Date of Last Order: 09/09/2020

Date of Judgment: 11/12/2020

Aboud, J.

The Applicant, CI GROUP MARKETING SOLUTION filed the present application seeking revision of the award of the Commission for Mediation and Arbitration (herein CMA) in labour dispute No. CMA/DSM/TEM/435/2016, dated 10/10/2018 by Hon. Mikidadi. A, Arbitrator. The application was made under the provision of section 91 (1) (a) (b) 91 (2) (a) (b), 94 (1) (b) (i) of the Employment and Labour Relations Act, [CAP 366 R.E. 2019] (herein referred as the Act), Rules 24 (1), 24 (2) (a) (b) (c) (d) (e) and (f), 24 (3) (a) (b) (c) (d), 24 (11) (c) and 28 (1) (c) (d) (e) of the Labour Court Rules, GN. No. 106 of 2007 (herein referred as the Labour Court Rules).

The application was argued by way of written submissions where both parties were represented by Learned Counsels. Mr. Saulo Kusakalah, learned Counsel appeared for the applicant while Mr. Elibahati Akyoo, learned Counsel was for the respondent.

The application emanates from the following background. The respondents were employed on different date, 1st respondent was employed on 05/03/2015 as a Graphic Designer and the 2nd respondent was employed on 20/03/2015 as a Supervisor of offset Department. Both of them they were terminated on 06/09/2016 on reason of misconduct (abscondment), being aggrieved with employers' decision, respondents filed the matter at CMA.

CMA determine the same on their favour, being dissatisfied by the CMA's decision the applicant filed the present application.

The applicant moved the Court on the following orders: -

(i) That this honourable Court be pleased to call for, inspect, and revise ruling delivered on 10/10/2019 by Hon. Mikidadi, A. (Arbitrator) in complaint No. CMA/DSM/TEM/435/2016.

(ii) Cost to be provided for,

(iii) Any other order deems fit and just to grant.

Arguing in support of the application Mr. Saulo Kusakalah submitted that the respondent absconded from work for more than 5days from 27/08/2016 up to 03/08/2019 without a leave contrary to Code of Good Practice of GN. No. 42 of 2007, on such reason respondent decided to terminate the employment contract procedurally.

It was further submitted that; the applicant had a good reason to terminate the contract but the arbitrator misdirected herself by deciding a case basing on one side evidence while the respondent was absent for only two (2) days.

He thus, prayed for the CMA's award to be quashed.

Resisting the application Mr. Elibahati Akyoo, Learned Counsel submitted that, the reason for termination was abscondment, but such reason was not justified under Section 37 of the Act. He argued that on 03/08/2016 respondents were arrested and charged with gross dishonesty of using applicant's properties for their own interest and, were released on 01/09/2016. He submitted that, on

03/09/2016 they reported back to their employer (applicant), surprisingly they were served the letter dated 27/08/2016 which required them to explain about their dishonesty of using the applicant's properties for their interest and, were required to submit their defence within 48 hours.

Mr. Elibahati Akyoo submitted that on 06/09/2016 the respondents reported back to the applicant with their defense letters which were admitted before the CMA as Exhibit PW-1 and PW-2. However, on that material date they were served termination letters for the reason that they absconded from work for 5 days.

It was further submitted that both the reason for termination of the respondents and procedures applied in their termination were not fair. Mr. Elibahati Akyoo argued that respondents were terminated for abscondment from work while they were charged with gross dishonesty and even the procedures were not followed. He submitted that the reason for termination which is abscondment from the working place was not proved as were terminated without being heard or defended their case. So, he said that was against the procedures as there was no disciplinary hearing which was conducted

following their letters of defence on the offence charged against. He further submitted that, it was not proper to terminate them on 06/09/2016, the same date that they submitted the defence. Therefore, the respondents were denied the right to be heard on the charged offence of gross dishonesty as well as the reason for termination (abscondment from the work place).

Lastly, Mr. Elibahati Akyoo submitted that, because the termination in this matter was unfair substantively and procedurally, the respondents deserved in law to the payment of compensation as provided under Section 40 (1) (c) of the Act. He thus, prayed the respondents be compensated 12 months' renumeration instead of 6 months awarded at CMA.

Having considered the parties submissions and CMA's record, it is clear that there are only three issues which this Court is called upon to determine that: -

(i) Whether the applicant had valid reasons to terminate the respondents.

(ii) Whether the applicant adhered to procedures in terminating the respondents.

(iii) The reliefs which each party is entitled to.

On the first issue that, whether the applicant had valid reason for terminating the respondent.

From the outset let me spend some time to say that the right to hire and fire, which is termination of employment at the employer's will is not part of the Tanzania Labour Laws. Under our labour laws the employee has a legitimate right to expect that if everything remains constant, he/she will be in the service throughout the contractual period. That is why the employee has remedy where that right is breached by way of special damages, compensation and reinstatements orders.

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

> *'S. 37 (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 spirit regarding the above provisions is to ensure that termination of employment in our country has to be on the basis of valid reasons and not employers will or whims. This is also the position of the International Labour Organization Convention (ILO) 158 of 1982, Article 4 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'.

From the above position of the law, it is very clear that employers are required to examine the concept of fair termination on the basis of employee's conduct, capacity, compatibility and operational requirement before terminating employment of their employees. It is also employers' legal duty in any proceedings concerning unfair termination of employment to prove that the termination is fair as per Section 39 of the Act.

It is on record that apart from being arrested on 30/08/2016 the respondents were served with the letter to give explanations regarding dishonesty on 03/09/2016 and they were given 2 days to reply on the same, surprisingly they were terminated for absenteeism and insubordination as per letter of termination dated 06/09/2016. Under normal circumstances the question before this Court if the applicant manages to give respondents letter of explanations as

evidenced by Exhibit P-4, why he failed to inform them about the hearing of another charge of absenteeism and subordination.

It is settled principle, of the law that no person shall be condemned without being heard is now legendary. Moreover, it is trite law that any decision affecting the rights or interests of any person arrived at without hearing the affected party is a nullity, even if the same decision would have been arrived at had the affected party been heard. [See - **JOHN MORRIS MPAKI vs. THE NBC LTD. AND NGALAGILA NGONYANI,** Civil Appeal No. 95 of 2013 (unreported)].

Again, in the case of **DEO SHIRIMJA VS TWO OTHERS,** Civil Application No. 34 of 2008 (unreported), the High Court made an unsolicited order without hearing the affected parties. That order was nullified and set aside by the Court having said: -

> *'None of the parties was heard at all before the order was made. As it turned out, the order, made in breach of the rules of natural justice, immediately adversely affected the plaintiffs in the suit and subsequently the current applicants who were the agents/servants of the former. It is*

established law that any judicial order make in violation of any of the two cardinal rules of natural justice is void from the beginning and must always be quashed, even if it is make in good faith'.

In the present application the right to be heard was not adhered to by the applicant as the respondent were charged for another offence and terminated for another offence, therefore there was no valid reason for termination.

Therefore, applicant's allegation that there was a previous warning lacks legal stance as for the same to be operative it must be within six (06) months from the first warning. Also, the applicant acted contrary to Rule 12 (2) of GN. 42 of 2007 by terminating on the same as the offence itself attract warning and not termination.

Under the circumstances and on the basis of the above discussion, I find no reason to fault the Arbitrator's findings regarding the reason for termination as it was unfair.

On whether the applicant adhered to procedures in terminating the respondents.

Since the termination fall under misconduct, then for termination to be procedurally fair the applicant herein had to follow the procedures laid down under Rule 13 of GN. No. 42 of 2004 including investigation, notification of alleged offence, time to prepare for the defense and the right to be heard.

However, things are different in this application because the respondents were not afforded their fundamental right to be heard and, no evidence was tendered to show that they failed to appear before a disciplinary hearing following the applicant's letter of 03/09/2016 demanding their explanation regarding the allegation of dishonesty as evidenced by Exhibit P-4 and P-5. That the applicant was capable of notifying them regarding the pending hearing as it was conducted on 06/09/2016 but he failed to do so.

On the basis of the above discussion, I am of the view that, even though CMA did not discuss much about the issue of procedure this Court found it to be very pertinent and, as a result observed the procedures in terminating the respondents were unfair because the provisions of Rule 13 of GN. 42 of 2007 were not complied with.

As regard to the last issue that what reliefs each party is entitled to, unlike the arbitrator's award on this aspect, since I found the termination was both substantively and procedurally unfair, I accordingly award the respondents according to section 40 (1) (c) of the Act. That they are to be paid compensation of twelve (12) months' remuneration and not six (6) months as it is in CMA award.

On the basis of the above discussion and the circumstance of this application, it is crystal clear that applicant failed to justify his claim that the arbitral award was not proper and deserves revision by the court save the payment of compensation to the respondent as observed by the court.

In the result, the application is found to have no merit and accordingly not allowed. The applicant is ordered to pay the respondents compensation of twelve (12) months' remuneration and not six (6) months as it is in CMA award.

Accordingly, is so ordered.

I.D. Aboud
JUDGE
11/12/2020