

**IN THE HIGH COURT OF TANZANIA**  
**LABOUR DIVISION**  
**AT DAR ES SALAAM**

**REVISION NO. 742 OF 2019**  
**BETWEEN**

**BARTHOLOMEO A. GUNZA..... APPLICANT**

**VERSUS**

**DAR CERAMICA CENTRE (2001) LTD..... RESPONDENT**

**JUDGMENT**

Date of Last Order: 20/10/2020

Date of Judgment: 11/12/2020

**A. E. MWIPOPO, J.**

The Applicant, **BARTHOLEMEO GUNZA** filed the present application seeking revision of the decision of the Commission for Mediation and Arbitration (herein CMA) in labour dispute No. CMA/DSM/ILA/R.1302/17. The applicant is praying for the following orders:-

- i. That this Honourable Court may be pleased to call for and examine the proceedings and the subsequent award of the Commission for Mediation and Arbitration at Dar es salaam in labour dispute No. CMA/DSM/ILA/R.1302/17 by Hon. Masaua, A., Arbitrator, served to Applicant on 06/08/2019 in order to satisfy itself on the appropriateness of the said award.

- ii. That this Honourable Court be pleased to revise and set aside the said award.
- iii. That this Honourable Court may be pleased to grant any other relief it may deem fit and just to grant.

The Applicant's legal issues arising from the material facts were found in paragraph 20 of the Applicant's affidavit in support of the application. The legal issues are as follows:-

1. Whether the Arbitrator acted in the exercise of her jurisdiction illegally or with material irregularity in deciding that the reason was fair.
2. Whether the Arbitrator has acted in the exercise of her jurisdiction illegally or with material irregularity in deciding that the procedure was fair.
3. Whether the Arbitrator has acted in the exercise of her jurisdiction illegally or with material irregularity in deciding that the Applicant was not entitled to anything as the termination was fair.

The application was argued by way of written submissions. Both parties to this application were represented. Ms. Stella Simkoko, learned

Counsel, appeared for the applicant, while, Ms. Hellen Ngelime, learned Counsel represented the respondent.

Arguing in support of the first ground whether the reason for termination was fair, Ms. Simkoko submitted that the Arbitrator erred in his findings as he failed to analyze the applicant's claim versus the respondent's decision. She submitted that the reason for misconduct was designed by the respondent so as to refrain from responding Applicant's claim for apology after being accused for theft as justified by a letter dated 07/08/2017 - Exhibit AW-5. The respondent forced the Applicant to continue with the same work of store keeping while the system on several occasion led him to be accused of theft. The Applicant claim for apology as supported by Exhibit D-7 is well guaranteed by Article 12(12) of the Constitution of United Republic of Tanzania, 1977. Therefore, the Respondent's reason for termination was not genuine as their employment relation turned sour after the Applicant claims for the apology.

As to the second ground of revision regarding the procedure for termination, it was submitted by the Applicant that the procedure was unfair as evidenced by Exhibit D-14 which shows that no Respondent's witness testified anything against Applicant's as recorded at item No. 7 of the said exhibit. The Respondent alleged that the Applicant destroyed the

meeting in Item No. 11 of Exhibit D-14, but there is no evidence on how the applicant committed the misconduct. In such circumstances, the procedure for termination was not fair.

Turning to the last ground of revision regarding the reliefs available, Ms. Simkoko submitted that since the reason and procedure for termination were both unfair, the applicant was entitled to reinstatement or compensation as per Section 40(1)(a) of the Employment and Labour Relation Act. No. 6 of 2004 but the Arbitrator has not awarded anything to the applicant. The Applicant prayed for the application be allowed.

In reply, Ms. Hellen Ngelime, the Respondent's learned Counsel submitted that the reason for termination was fair on the ground that the applicant refused to work even after being transferred as he requested. The Applicant was required to report the loss of property which occurred because at that time the Applicant was a Depot Manager. Thus, it was not wrong to call the Depot Manager to explain how the loss of property occurred. This was the investigating the crime.

Further, she submitted that the Respondent refused to report at his new work station as indicated in Exhibit D-12. Since there was a misconduct, the Arbitrator was right to hold that the reason for termination

was fair. The Arbitrator did not error in law by stating that the Applicant was never accused of theft as stated at page 7, paragraph 2 of the award.

On the Applicant second ground of revision, Ms. Hellen submitted that the procedures for termination was well adhered by the respondent and the reason for termination was a misconduct as the applicant decided not to work on his trained job, even after being transferred to another working station.

Regarding the last Applicant's ground of revision, the Respondent submitted that since the termination was both procedurally and substantively fair as per Section 37(2) (a) and (b) of the Employment and Labour Relations Act, 2004, the Arbitrator was right to award nothing to the Applicant. The Respondent prayed for the application to be dismissed.

Having carefully examined the parties' submissions, and considering CMA's records, I find the issues for determination before the Court are as follows;-

- (i) Whether the Applicant had valid and fair reasons for terminating the Respondent's employment.
- (ii) Whether the procedures for termination was fair.
- (iii) What reliefs are entitled to each party?

In determination of the first issue, section 37 (2) (a) (b) of the Employment and Labour Relations Act, 2004, provides that the termination of employment is unfair if the employer fails to prove that the reason for termination is valid and fair. The sections reads as follows, I quote:-

*'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.'*

Thus, in the termination by employer, it is the duty of the employer to prove that termination was fair. Also, section 39 of the Employment and Labour Relations Act provides that it is the duty of the employer in any proceedings concerning unfair termination of an employee by an employer to prove that the termination is fair. The standard of proof is on a balance of probability as in any civil case.

It is on record that the Applicant, who was employed by the Respondent as a Store Keeper, was transferred from Chang'ombe workstation to Kariakoo according to letter of transfer – Exhibit D4 following his own request for transfer after accusation from the

Respondent that he has committed a theft offence. The Applicant refused the transfer through a letter dated - Exhibit D-8 on the reason that he should be given other post which does not deal with stock keeping. However, it was not possible for the Respondent to provide the Applicant with different job as he was employed as a store keeper. Thus, I am of the view that the Respondent discharged his duty by offering another similar post to the Applicant following the stealing allegation, the transfer which the Applicant rejected. The offence committed by the Applicant in refusing to work goes to the root of employment contract, thus it is an act amounting to gross misconduct which may justify termination as per Rule 12 (3) of the Employment and Labour Relations (Code of Good Practice) Rules, 2007. In such circumstance, I find that the evidence available proved that there was valid and fair reason for termination.

The second issue is whether the procedure for termination was fair. The Employment and Labour Relations Act, 2004, provides in section 37 (2) (c) that a termination of employment by an employer is unfair if the employer fails to prove that the employment was terminated in accordance with a fair procedure. The procedures for termination are provided under Rule 13 of the Employment and Labour Relations (Code of Conduct and Good) Rules, G.N. No. 42 of 2007. The evidence available in record shows that the Applicant refused to report at Kariakoo store as a storekeeper for

the reason that the Respondent have not apologized for accusing him for stealing and that he is not ready to work in the store as per Exhibit AW4. The Respondent served disciplinary charges for insubordination to the Applicant on 23<sup>rd</sup> November, 2017, and the charges informed the Applicant that disciplinary hearing will be conducted on 27<sup>th</sup> November, 2017, but the Applicant rejected to receive it. However, on 27<sup>th</sup> November, 2017, the Applicant attended the disciplinary hearing as per exhibit D14 which is the hearing form.

The Exhibit D14 shows that the Applicant ruined the disciplinary hearing for rejecting to cooperate with the Disciplinary Committee and to sign the attendance of the hearing. The trial Arbitrator was of the opinion that there is no clear explanation how the Applicant ruined the hearing. I agree with the Arbitrator that there is no sufficient explanation on how failure to cooperate ruined the Disciplinary Hearing. In absence of explanation it is not possible to understand the act which made the Committee conclude that the disciplinary hearing was ruined. The testimony of Emmanuel Msuya – DW1 shows that the Applicant was not responding to the Committees questions and that he was rude. Despite of the conduct of the Applicant the Committee was supposed to proceed with the hearing and call the witness before making its findings and recommendations. The Respondent terminated the Applicant employment

on 28<sup>th</sup> November, 2017 for misconduct. The termination letter – Exhibit AW2 shows that the reason for termination is that he was found guilty for misconduct by the Disciplinary Committee. Unfortunately, that is not what the hearing forms shows.

The hearing form – Exhibit D14 shows that the hearing was ruined by the Applicant and the area showing the Committee's recommendation states that the meeting was ruined. Thus, there is nothing in record to show that the Disciplinary Committee recommended for the termination of Applicant employment as it was stated by termination letter.

According to rule 13 (10) of G.N. No 42 of 2007 the employee shall be given the reasons for termination and reminded of any rights to refer a dispute concerning the fairness of the termination under a collective agreement or to the Commission for Mediation and Arbitration. I'm of the opinion that in the termination for misconduct the reason for termination must be genuine coming from what transpired during the disciplinary proceedings. In this application there is nothing in record to show that the Disciplinary Committee recommended for the termination of Applicant employment as the termination letter alleged. Therefore, I find that the procedure for termination was not fair.

As I find in the second issue that the Applicant termination was not fair procedurally, I'm of the opinion that the Applicant has to be compensated for the procedural unfair termination which the amount of compensation is less than what would have been provided if the termination was unfair both substantively and procedurally. Thus, I award the Applicant compensation for 6 months' salary for unfair termination as provided under section 40 (1) (c). Since the evidence is silent on the salary of the Applicant and the only thing showing current Applicant's salary was Tshs. 570,000/= is his opening statement before the Commission, the same will be used as basis of the calculation.

Therefore, I order the Respondent to pay a total of Tshs 3,420,000/= to the Applicant being a 6 months' compensation for unfair termination. The CMA award is hereby set aside. This being a labour dispute, I make no order as to the cost of the suit.



**A. E. MWIPOPO**  
**JUDGE**  
**11/12/2020**