

IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 368 OF 2019

BETWEEN

JUMA RASHID NDEGE..... APPLICANT

VERSUS

SBC TANZANIA LTD..... RESPONDENT

JUDGMENT

Date of Last Order: 06/11/2020

Date of Judgment: 24/12/2020

Aboud, J.

Aggrieved by the Award of Commission for Mediation and Arbitration [herein after to be referred to as CMA] delivered by Hon. Mwaikambo, K. V. Arbitrator on 10th September, 2018 the applicant, Juma Rashid Ndege filed this application praying for this court to revise and set aside the whole award and any relief which the court may deem fit and just to grant. The application was filed under the provisions of Section 91 (1) (a), (2) (b) and (c), Section 94 (1) (b) (i) of the Employment and Labour Relations Act, Cap. 366 RE 2019 (herein the Act), Rules 24 (1), (2) (a) (b) (c) (d) (e) and (f), (3) (a) (b) (c) and (d) and 28 (1) (c) (d) and (e) of Labour Court Rules, GN.

No. 106 of 2007 (to be referred as the Rule of the Court). The application is supported by the affirmed affidavit of the applicant. In challenging the application, the respondent filed a counter affidavit of Patrick David, their Principal Officer.

Briefly here are the facts; on 16th January, 2007 the applicant was employed by the respondent as a driver. He worked with the respondent until 26th September, 2015 when he was terminated on ground of intentional breach of company policies and procedure. It is on record that, on 7th August, 2015 while on duty the applicant had an accident which resulted to loss of company's funds and properties valued Tshs. 14,790,000/=.

It was alleged by the applicant that, after the accident he was invaded with two people who pulled him out of the truck, he thus ran for his safety. After his return in 30 minutes, he just found that a safe with cash was broken, and EFD machine, 455 crates with empty bottles were stolen. He informed the supervisor of the car breakdown and on the next day he reported to the police station. The respondent decided to charge him and held a disciplinary hearing where the applicant was found guilty, hence terminated on 26th September, 2015. It is on record that the respondent also filed a

Criminal Case No. 124/2015 against the applicant. On 21st April, 2016 the applicant was found not guilty of the criminal offence charged and was acquitted. Having being acquitted, the applicant reported back to work but was issued a termination letter.

Being aggrieved with the termination the applicant referred the matter to the CMA, where his complaint was dismissed for want of merit. Dissatisfied with the CMA's decision, the applicant filed the present application. Hence this judgment.

Both parties were represented by the learned Counsels. Shamima Salim Hiza represented the applicant, while the respondent was served by counsels from AKIPLAW Advocates, namely Jacktone Odhiambo Koyugi, Haron Otieno Oyugi, Nsajigwa Amon Bukuku and Amandalala Kessy.

With leave of the Court the application was disposed of by way of written submissions. I appreciate both parties for adhering to the schedule and for their submissions.

In support of the application the applicant's counsel submitted that, the arbitrator failed to take into consideration the applicant's evidence, as a result he arrived to decision in favour of the

respondent. In his evidence the applicant stated that, his termination was done when he was arrested for criminal charges initiated by the respondent, at Mkuranga District Court where the case was dismissed.

Learned counsel further argued that, the respondent failed to prove his allegations of theft against the applicant, which would have formed the basis for the termination, therefore had no valid reason of terminating the applicant. He referred Section 37(5) of the Act and the cases of **Idd Rajab Mgalla v. Tanzanite One Mining Ltd.**, Rev. 48/2013 and the case of **Leopard Tours Ltd. v. Rashid Juma and Abdallah Shaban**, Rev. 55/2013. In conclusion prayed for application be allowed.

In response, the respondent's counsel submitted that, the respondent had valid reason to terminate the applicant, and the respondent followed all the required procedure for the termination. It was submitted that applicant's termination was on ground of gross misconduct and failure to handle his roles and responsibilities faithfully.

Learned counsel further argued that, according to DW2's evidence, on the fateful day the applicant inordinately delayed to return the sales vehicle to the respondent without any explanation despite of being directed to do so earlier. The respondent's counsel contended that, the applicant withdrew all the cash sales from his phone contrary to the normal of transaction in which cash sales were kept in his phone. It was further submitted that the applicant reported to DW2 only the accident and cancelled the report about theft of the applicant's money and goods which were under his control. It was argued that, even the scene of crime did not suggest any occurrence of accident or robbery as alleged by the applicant. The respondent counsel further argued that, the applicant did not report to management incident but he did so to the police.

Further the respondent's counsel argued that, the applicant never tendered before CMA the judgment of the criminal case which he alleged to have been discharged. Therefore, the arbitrator could not act on unproven allegations. That, the respondent did not reported any criminal complaint against the applicant, rather it was the applicant who had reported the matter to the Vikindu and Mkuranga police stations.

It also was the respondent's counsel argument that Section 37 (5) of the Act, apply in situations where the employer initiated criminal proceedings against an employee prior to termination of the employment. Since it is the applicant who reported the matter to the police, then the said section will not apply in this matter.

Concerning the procedure for termination the respondent counsel submitted that, the respondent complied with all the procedure before terminating the respondent. The applicant conducted investigation as per exhibit D2 and D3. The applicant was summoned for disciplinary hearing as per exhibit D4 and he attended the hearing accompanied by a chairman of a trade union Mr. Said Stawi. After hearing he signed the minutes of the meeting as is reflected in exhibit D5 (Outcome of the hearing). Therefore, the respondent's counsel strongly submitted that, the applicant was not forced to sign the disciplinary hearing minutes as he alleged. He prayed for dismissal of the application.

In rejoinder, the applicant's counsel reiterated his submission in chief.

After careful consideration of the parties' submissions, court records and laws applicable, this court has the following issues for determination:-

- i. Whether the respondent had valid reason for termination of the applicant.
- ii. Whether the respondent complied with the procedure for termination.
- iii. Reliefs entitled to the parties.

In the first issue as to whether there was valid reason in terminating the respondent's employment, it is an established principle that, employers should only terminate employees basing on fair and valid reason.

The concept of a valid reason is elaborated under Section 37 (2) of the Act, which provides:-

'Section 37 (2) - A termination of employment by an employer is unfair if the employer fails to prove: -

(a) that the reason for the 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.*

This court in the case of **Tanzania Revenue Authority V.**

Andrew Mapunda, Labour Rev. No. 104 of 2014, held that:-

'(i) It is the established principle that for the termination of employment to be considered fair it should be based on valid reason and fair procedure. In other words, there must be substantive fairness and procedural fairness of termination of employment, Section 37 (2) of the Act.

(ii) I have no doubt that the intention of the legislature is to require employers to terminate employees only basing on valid reasons and not their will or whims'.

Also, in the case of **National Microfinance Bank V. Japhet Machumu**, Rev. No. 710/2018 (unreported) this Court held that: -

'Termination of employment must be first substantively fair with fair and valid reasons

putting in regard that the concept of right to work as a component of human rights, is so fundamental'.

In the matter at hand, the applicant was terminated on ground of intentional breach of company policies and procedure which caused the respondent's to loose trust on him. The disciplinary Committee's found that from the circumstances of the incident, there was an intentional breach of company's policies and procedures. The committee observed that there was intentional act of fraud, embezzlement, theft of employer's properties and intentional damage of the company's assets. It was the arbitrator's finding that the respondent had valid reason of terminating the applicant.

On records it is undisputed that, there was an accident which occurred at Vikindu area, and the respondent's mechanics went to fix the track after the applicant had reported the breakdown to his supervisor. It is also undisputed that, due to that accident the respondent incurred a loss of Tshs. 14,790,000/= after the properties and cash which were in the car were stolen. On the time of event the applicant was with PW2, his assistant who proved that after the accident they run from the accident as some people invaded the truck

and on their return after 30 to 40 minutes, they found almost 455 crates and 9 million shillings were stolen. The disputed fact is whether the accident was intentionally planned by the applicant.

This court after carefully observation of the records had found that, after occurrence of the accident the applicant had not immediately reported the issue of theft to his supervisor, even on the next day he just went to report the same to the police from his home. At the accident, they were invaded by two people while they were three on the track to wit, the applicant and two others, but they decided to run and not confronting the invaders. Within those 30-40 minutes prior their return, the applicant failed to show what measures did they take to protect and mitigated the applicant's loss of properties. Also the applicant's action to withdraw all the cash sales deposited on his phone was contrary to the normal way of transaction as clearly submitted by the respondent. Such applicant's behavior clearly shows that, he had committed the offence charged by the respondent. Under those circumstances, it is with no hesitation, the applicant's actions created suspicious environment which led to the employer's lack of trust against him. Therefore, I

find no reason to fault the arbitrators finding that termination was substantively fair.

In regard to the 2nd issue, of whether the procedure for terminating the applicant were fair. It is an established principle that termination of employment shall also base on fair procedure as per Section 37 (2) (c) of the Act (supra). It was alleged by the applicant that, the procedure for his termination were not fair as he was not afforded the right to be heard. That the respondent forced him to sign the disciplinary minutes without being heard. He also contended that was terminated while the respondent had filed a criminal case at Mkuranga District Court.

I have cautiously gone through the records and find that the applicant was charged as per the letter to show cause (exhibit D2), issued with a notice to attend the disciplinary hearing on 8th September, 2015 as per summons to attend disciplinary hearing (exhibit D4). Following that the disciplinary hearing was held on 16th September, 2015 in accordance with Exhibit D5. In disciplinary hearing the applicant's representative was also present, which complied with the provision of Rule 13 (9) of Employment and Labour Relations (Code of Good Practice) GN. 42/2007 (herein GN. 42/2007).

Furthermore, the records reveal that, the disciplinary hearing minutes were signed by the applicant in person. It is clear from the records that there is no any evidence from the applicant to show that he was forced to sign the relevant minutes as he alleged. In such situation Court finds that the allegation that applicant was forced to sign the disciplinary hearing minutes has no basis.

As regard to the contention that, the applicant was terminated while there was pending criminal case against him at Mkuranga District Court, the records divulge that, the applicant was charged with the offence of conspiracy and stealing by agent in Criminal case No.124/2015, which was dismissed for lack of merit on 21st April, 2016. The law under Section 37 (5) of the Act provides that:-

'No disciplinary action in form of penalty, termination or dismissal shall lie upon an employee who has been charged with a criminal offence which is substantially the same until final determination by the court and any appeal thereto.'

In this aspect, the respondent denied to have initiated the criminal proceedings against the applicant thus Section 37 (5) do not apply in the circumstances of this case. It is crystal clear in the

attached judgment of that criminal case, the respondent's personnel's including DW2 were the prosecution's witnesses. Even in the untyped proceedings when replying to cross examinations questions DW2, testified that it was himself and the Human resource officer who initiated the criminal case against the applicant. Therefore, contention that the respondent has not initiated the criminal case against the applicant is baseless. What is uncertain here is when the time the applicant was charged with the criminal case was. That, was it after or during the disciplinary proceedings against the applicant?

I have cautiously gone through the records and I came across the applicants CMA's opening statement, in which he stated that his termination was on 26th September, 2015 and he was arrested on 3rd November, 2015 and remanded at Buguruni Police Post before was transferred to Mkuranga. He further stated that, upon his inquiry DW1 police statement was recorded on 29th September, 2019. From the applicant's statement, it is apparent that, criminal charges against him were filed after his termination and not as he alleges. The fact that he was already terminated, does not bar the respondent as an employer to institute the criminal charge against the applicant. This position is clearly provided under Guideline 9 (5) of the Employment

and Labour Relations (Code of Good Practice) GN. 42/2007. The relevant guideline provides that:-

'Guideline 9 (5) - It is recognized that an employee's misconduct may in certain circumstances result in criminal proceedings being instituted against the employee (eg. cases of theft or assault). A clear distinction should be made between criminal proceedings and internal disciplinary proceedings. Disciplinary action should be instituted and decided fairly, irrespective of the process and outcome of any criminal proceedings instituted'.

Basing on that position of the law, I am of the view that the respondent did not contravene respondent to Section 37 (5) of the Act. Therefore, I have no reason to fault the arbitrator's finding that termination was procedurally fair.

In regard to the 3rd issue as to what relief the parties are entitled to, is on record in his CMA F1 the applicant prayed for Tshs. 752,436,400/= as compensation for his termination. The same was not awarded by the CMA because it found the termination was both substantively and procedurally fair. According to Section 40 (1) (c) of

the Act, compensation is the remedy awarded to someone whose employment contract was terminated without valid reason and fair procedure. However, this is not the position in this case and the applicant is not entitled to any compensation as rightly held by the arbitrator.

In the result the application has no merit and is hereby dismissed.



I.D. Aboud

JUDGE

24/12/2020