IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LABOUR DIVISION)

IN THE DISTRICT REGISTRY OF KIGOMA

AT KIGOMA

LABOUR REVISION APPLICATION NO. 2 OF 2020

(Arising from Labour Dispute No. CMA/KIG/130/2019 at the Commission for Mediation and Arbitration (CMA) at Kigoma).

K.K. SECURITY.....APPLICANT

VERSUS

RAJABU LUAMBANO.....RESPONDENT

JUDGMENT

Dated: 3/8/2020 & 3/8/2020

Before: Hon. A. Matuma, J

The Respondent **Rajabu Luambano** was an Employee of the Applicant as a Security Guard and was appointed supervisor in his site of work at **RSC Nyarugusu**.

He was accused to default his duties as a supervisor by allowing absence of other Security Guards on their duties without the knowledge of the Employer which brought about complaints from her client herein above named RSC Nyarugusu.

The Employer/Applicant at first took disciplinary actions against the Respondent by issuing him a Final Written Warning after a due disciplinary hearing.

Then the Applicant's client RSC Nyarugusu denied access of the respondent to the site of service and therefore the Applicant wrote to the respondent informing him that; for he has been denied access by the

client the only option available was to change his working station. Part of that letter exhibit R7 reads;

> *"You can recall that, after the whole disciplinary process following the allegations charged against you, finally you were issued with a final Written Warning and ordered to return to your working station.*
>
> *Together with the Final Written Warning issued to you, please be informed of the following;*
>
> 1. *Unfortunately, your access has been refused by client RSC Nyarugusu.*
> 2. *Following to that effects, the only available alternative to accommodate you is to change your working station and work in Mwanza. Therefore, you are required to report to your site coordinator in order to get repatriation cost ready for shifting to Mwanza".*

It seems, the problem arose from this point as the respondent refused to acknowledge service of the letter and absented himself from duty which necessitate another Disciplinary meeting to be convened against him.

According to the Applicant's evidence, the respondent was issued with a disciplinary hearing notice but he refused it which necessitated the Disciplinary committee to proceed hearing the accusation exparte and ended by terminating the service of the respondent hence this dispute at the Commission for Mediation and Arbitration for Kigoma.

After a full trial, the honourable Arbitrator found that the grounds upon which termination was based were sound and justifiable but that the due procedures for termination was not adhered;

"Hata hivyo kwa kukataa kusaini barua ya uhamisho, mlalamikaji alitenda kosa.

*...**hivyo mlalamikiwa alikuwa na sababu ya msingi ya kumwachisha kazi mlalamikaji".***

As I have earlier on stated herein above the Arbitrator found that despite of good and justifiable reason for termination of service the due process for termination was not followed. The complained breached due process was that the Respondent was not heard in the Disciplinary hearing which terminated him. The arbitrator was not satisfied that the notice of hearing was dully served to the respondent before the Disciplinary hearing could proceed;

"Kwa mlalamikiwa kushindwa kuthibitisha utumwaji wa hati ya mashtaka na mwaliko wa kuhudhuria kikao cha nidhamu, ninaona kuwa mlalamikaji aliachishwa kazi bila kupewa nafasi ya kusikilizwa".

The honourable arbitrator then awarded the respondent.

i. *Likizo Tshs 300,000/=*
ii. *Gharama za usafiri*
    a) *Basi kutoka Kigoma kwenda Mwanza Tshs 41,800/=*
    b) *Mizigo Tani 3 Tshs 2,298,000/=*
iii. *Fedha za kujikimu miezi 7 Tshs 2,100,000/=*
iv. *Fidia miezi 6 Tshs 1,800,000/=*

The total award was thus **Tshs 6,498,000/=.**

The Applicant being dissatisfied with that award against her preferred this application for revision under four grounds but at the hearing of this application only three of them were argued while the other one withdrawn.

The grounds of complaint are;

a) *That the arbitrator erred to rule out that termination procedures were not followed while the available evidence is to the contrary.*
b) *That the Arbitrator improperly evaluated the evidence on record thereby reaching to a wrong conclusion.*
c) *That the Arbitrator wrongly based the calculations of the reliefs on assumptions contrary to the law.*

At the hearing of this Application Mr. Salehe Nassoro learned advocate represented the Applicant whose officer Mr. Dawson Batakangwa was also present.

Mr. Joseph Mathias learned advocate entered appearance holding brief of Advocate Michael Mwangati for the Respondent. Even though, the respondent despite of having been effected service through his advocate Mr. Michael Mwangati of AMC Attorneys since way back on 20/2/2020 defaulted to file a Notice of opposition, a counter affidavit or both within fifteen days after the service as mandated by rule 24 (4) (a) of the Labour Court Rules, G.N 106 of 2007. I therefore, ordered an exparte hearing of this application. With that order, Mr. Joseph Mathias learned advocate sought and dully granted leave to quit leaving the hearing behind him.

Mr. Salehe Nassoro learned advocate started to address the first ground of complaint having adopted the applicant's affidavit in support of the application.

He argued that, it was wrong for the arbitrator to rule out that the due procedures for a lawful termination was not followed while the evidence or record is clear that they were fully complied with.

He further argued that the respondent was not heard in the Disciplinary proceedings because he deliberately refused services of the notice of hearing and there was sufficient evidence to that effect.

He pointed the evidence to be the affidavit of one Nakumbuka Babaza an officer of the Applicant who witnessed the refusal of the respondent to receive the notice of hearing. The said witness along with his affidavit gave evidence during trial at CMA.

The learned advocate ended this first ground of complaint by arguing that under the circumstances, the Applicant was legally justified to proceed with the Disciplinary hearing exparte as the respondent waived his rights to be heard.

I am of the settled view that with the available evidence on record, this Applicant's ground of complaint has merit.

It is in evidence that on 16th May, 2019, the Applicant issued a notice to the Respondent of invitation for a Disciplinary hearing exhibit R.5 but the same is endorsed that he refused to sign in the presence of three witnesses, **Nakumbuka Babaza, Thabit Ulimwengu, and Joseph Mzungu.**

DW2, Nakumbuka Babaza testified to that effect. There was no good reason for disbelieving this witness and discrediting the evidence available to the effect that the respondent deliberately denied service particularly when it is on record that the Respondent himself admitted to have

developed a habit of denying service from the Applicant due to the advice he had obtained from his advocate.

> *"Baada ya kuona barua imeandikwa hivyo, mimi niliiomba kusudi nimpelekee mwanasheria kwa sababu* ***mwanasheria aliniambia nisisaini vitu nisivyovifahamu hasa kwa kuwa tulishaingia kwenye mzozo".***

It is further in evidence of the Respondent himself that they denied him that invitation for his refusal to sign;

> *"Baada ya hapo, alivyoninyima akanambia kama hutaki acha".*

With such evidence, it is obvious the respondent refused service on irrational advice of his advocate whom he did not disclose the name. In the circumstances and as rightly submitted by Mr. Salehe Nassoro learned advocate, the Applicant was legally allowed to proceed with the Disciplinary hearing in the absence of the respondent as provided for under rule 13 (6) of the Employment and Labour Relations (Code of Good Practice) G.N. 42 of 2007 that;

> *"Where an employee unreasonable refuses to attend the hearing, the employer may proceed with the hearing in the absence of the employee".*

Refusal to accept service is as good as refusal to attend the hearing. It was wrong therefore, for the arbitrator to rule out that there was no evidence of service while there is, but it was the respondent himself who denied service on irrational, unethical, and misleading advice of the so called "his advocate", that he should refrain from acknowledging service from his employer because they are in dispute.

The respondent should have acknowledged service and forward the same to his advocate for further advice and not to deny the service.

The respondent had even earlier on refused to sign the transfer letter and the arbitrator had observed that such was wrong;

> *"... kwa kukataa kusaini barua ya uhamisho mlalamikaji alitenda kosa".*

Since the Arbitrator's award based on the alleged fact that the respondent was not served a notice of hearing to conclude that the termination was unlawful for breach of the right to be heard, and since I have found it to the contrary that the respondent deliberately denied service, I conclude the first ground that the due procedures for the lawful termination were dully complied with by the Applicant and the Respondent's termination was lawful and legally justified.

Before I proceed with the other ground, let me say something here. I discourage advocates to engage themselves into Labour disputes in disguise. That won't help their clients but lit fire to the burning dispute between the employer and the employee.

In this case no doubt, the respondent's advocate was part to the dispute between the parties in disguise.

He wrongly advised his/her client to deny service of documents from his employer as by doing so he/she was not helping but destroying whatever good relation which had remained between the parties. It is my firm view that; such is not the role of a determined advocate. The advocate should be party to the resolution of disputes and not a party to its scorching. Let me leave it as such.

The two remaining grounds were argued together. The learned advocate for the Applicant submitted that it was wrong to base the calculations at **Tshs 300,000/=** while the respondent's salary was **Tshs 167,781/=** per month.

The learned advocate further argued that even during trial that amount was not claimed and therefore, the arbitrator acted on assumptions which led to a wrong conclusion.

I agree with the applicant. I have not seen anywhere on record on how the learned arbitrator got this amount **Tshs 300,000/=.** The arbitrator did not even say anything as to why the calculation should have not been made basing on the contractual salary of **Tshs 167,781/=.** I refrain myself to make my personal assumption that the arbitrator might have been referring the said amount of Tshs. 300,000/= as the minimum wage. This is because, if that would have been the case, then he should have explained why didn't he abide by the Labour Institutions Wage Order, 2013, GN. No. 196 of 2013 which provides for the Minimum Wage in respect of Private Security Services to the tune of **Tshs. 150,000/=** for International and Potential Companies or **Tshs. 100,000/=** for small companies. In the circumstances and without assuming what was that **Tshs 300,000/=** for, I hereby set aside all the awards made out of the calculations basing on that amount of Tshs 300,000/=. In lieu thereof, I replace the due calculations for the terminal benefits to base on the contractual salary of **Tshs 167,781/=** which is an amount over and above the minimum wage for Security Service Companies.

I further set aside all the reliefs awarded to the respondent since there is no any explanation in the arbitration award as to how they were arrived at.

In lieu thereof, I replace with an order that the Applicant should provide the respondent with only the terminal benefits which are legally available such as certificate of service subject to the respondent having made clearance, repatriation to his recruitment station as per available options under section 43 of the Employment and Labour Relations Act No. 6 of 2004.

Also, since the Applicant in her Termination letter acknowledged an accrued leave for 42 days to the Respondent, I order such payments.

Having said all these it is hereby ordered that this application is allowed to the extent herein above explained and the Arbitrator's Award vide Dispute No. CMA/KIG/130/2019 is hereby set aside.

It is so ordered.

A. Matuma

Judge

8/3/2020