

**IN THE HIGH COURT OF TANZANIA
LABOUR DIVISION**

AT DAR ES SALAAM

REVISION NO.426 OF 2019

**MAHAMUDU KARAHA KIHUNA
NA WENZAKE WAWILIAPPLICANTS**

VERSUS

AL-HUSHOOM INVESTMENT (T) LTDRESPONDENT

JUDGMENT

Date of last Order: 13/08/2019

Date of Judgment: 09/10/2019

Z.G.Muruke, J.

Three named applicants were employed by respondent on divers dates as drivers, at respondent office located along Mandela Road. Their main job was to transport fuel within and outside the country. Respondent on 19th April, 2017 transferred applicant to another working station ICD, Kurasini Mafuta Stree. They were not satisfied with the transfer.They both did not report to work for two weeks. They were still coming to respondent office at Mandela road, until refused to enter the office.

After failure to report to work for two weeks, respondent requested for an explanation in writings. Yet, they did not report to their new working station. Respondent then gave applicant notice to attend disciplinary hearing. Upon fully representation, in the presence of applicant and their representative, disciplinary committee found guilty of misconduct of absconding from their work amongst others. Upon receipt of the report,

respondent terminated applicants. Being dissatisfied, they filed dispute at Commission for Mediation and Arbitration (CMA) in which their claims were partly allowed, but filed present revision raising following issue for determination.

“Whether it is proper for the arbitrator to grant payment of two months’ salary to applicants after she had find that the termination of employment was procedurally wrong.”

On the date set for hearing applicants were represented by Baltaza Kitundu advocate, while respondent had the service of Advocate Evans Ignace. By consent hearing was ordered to be by way of written submission on following schedule.

- (i) Applicant submission to be filed on or before 14/07/2020 and serve respondent counsel on some day before 3.30 PM.
- (ii) Respondent submission to be filed on or before 29/07/2020 and serve applicant counsel on same day before 3.30 PM.
- (iii) Rejoinder submission by applicant to be filed on 05/08/2020.
- (iv) Mention on 13/08/2020 to ensure compliance and set date of judgment.

Applicant counsel submitted that; despite arbitrator finding that procedure was not followed yet he granted two months salary to each applicant, by wrongly interpreting consolidated revision No. 370/2013 and 43/2013 between Saganga Mussa Vs. Institute of Social Work, and section 40(1) of Employment and Labour Relation Act No. 6/2004 that provides for minimum number of months payable once termination is unfair. Finding that the termination was partially procedural unfair although there was a good and substantial reasons for termination. Applicant counsel further

submitted that since in CMA form number one (1) applicant prayed for reinstatement, then, this court should re-instate the applicants.

On the other hand Respondent counsel submitted that the respondent informed the applicant to have been shifted from one work station to another station not far from each other and were doing the same job, working under the same employer, receiving the same salary. Meaning that the said relocation did not affect any of their fundamental rights under the contract. DW1, one Araphat Bahdella (the respondent's Human Resource Manager) testified in examination in chief that, after the complainants were informed to shift to Kurasini Work Station, they refused and forced to remain working at Mandela work station.

The applicants never reported to the new working station and when insisting on working at Mandela, they were refused entry to the yard. All the transfer letters were admitted as exhibits and formed item No. 1 of the respondent's list of documents to be relied upon, marked AH-1. Instead of reporting at Kurasini work station, they wrote letters complaining of the said change of work station specifically **MAHMOUD KIHUNA KARAHA** who in his letter alleged that, the respondent is segregative, denying him the right to be a leader of workers party in the respondent's company at Mandela and for that reason, he is not ready to accept any change of work station.

Respondent counsel further submitted that applicants allegations in their complaint letters are baseless and have nothing to do with the said change of work station. The reason for change of work station was the

need for more drivers at Kurasini station and nothing else and this fact was well put clear by DW1 (Araphat Bahdella) in his testimony.

The Complainants refused to report at a newly work station for more than two (2) weeks (From 20/04/2017 to 02/05/2017) meaning that they voluntarily absconded from work without assigning any sound reason. Having noted such insubordination, the respondent issued the applicant with letter requiring them to furnishing explanation within 48 hours but the applicants replied noting. The said letter were admitted as exhibits during hearing at CMA and were collectively marked exhibit AH-2. Following this incidence, the respondent procedurally charged the complainants for abscondment and gross insubordination and consequently summoned them in to a disciplinary committee by letters and the disciplinary committee was duly conducted and the complainants were given their full rights to defend their cases before the disciplinary committee. Photostat copy of the charges letter of summons and minutes of the disciplinary hearing were admitted as **Exhibits AH-4** at CMA.

The respondent employed all necessary procedures to terminate the applicants employments. Evidence by PW1 (Mahmudu Kihuna) that he does not recognize the minutes recorded during the disciplinary meeting is an outright lie. This witness contradicted himself during testimony by admitting to have attended the said meeting but at the same time declined to recognize the recorded minutes. In addition, since the said meeting was attended by one YASINI KABINGWA from CHAMAWATA, representing the applicants, this individual was to testify at CMA to corroborate and /or to

add value to the allegations of PW1, but he was never brought to testify. Respondent counsel prayed for dismissal of the revision.

Having gone through submission by both parties there is no dispute as to whatever, respondent absconded from the employment for two weeks. DW1 Araphat Bahdella evidence which has not been challenged even during cross examination by applicant counsel, is strong evidence. Not only DW1, but also applicants defense especially Mahmood Kihuna Karaha proves that he absconded from employment by not reporting to a new station. **The issue for determination is whether procedure was followed:-**

According to the evidence DW1, applicants were given time to show cause why disciplinary measure should not be taken after failure to report to the transferred station. Equal DW1 evidence reveals that, applicants were given opportunity to prepare themselves for disciplinary hearing. Exhibit AH-4 named form ya **kuhitajika kuhudhuria kikao cha nidhamu dated 16/05/2020, and charges were listed as follows:-**

- (i) **Utovu wa nidhamu uliokithiri**
- (ii) **Kutohudhuria kazini kwa zaidi ya siku tano mfululizo pasi na ruhusa.**

Exhibit AH – 4 was served to the applicants on the same day of 16th May, 2020, and disciplinary hearing was conducted on 20th May, 2020. According to Exhibit AH-5 in list of documents to be relied by respondent, disciplinary hearing minutes, hearing was conducted on 20/05/2020. Coram of the Disciplinary hearing meeting was attended by the following:

Ramadhani Hamza Juma	- Mwenyekiti -	AL-HUSHOOM INVESTMENT (T) LTD
Greyson N. Wimile	- Katibu Chamawamata -	Chawamata (representative of employees).
Arafat Ally Bahdela	Employer representative –	AL - hushoom
Amon Hashim Issa	Employer representative –	Al - hushoom
Yasin Kabingwa	Representative Chawamata	(representative of employee)
Ramadhani Juma Zengwe	} Complainants	
Bakari Mdiri Bakari		
Mahamood Karaha Kihuna		

From the coram above, a part from respondent's representative and applicant themselves, there were two person from **Chawamata** to counter check interest of applicants. Decision was reached in their presence, after hearing of all the parties. I believe, **Gerson M. Wimile** and **Yasin kabingwa** from Chawamata applicant's union could have been best witnesses for the applicants if such disciplinary hearing did not take place. In the eyes of the law, if either party failed to call material witness to prove or disapprove a certain fact, adverse interence is drawn that, had the witness testified could have testified against.

The principle was started in a famous case of **Azizi Abdallah Vs. Republic** [1991] TLR 71 when it was held that,

"The general and well known rule is that the prosecution is under a prima facie duty to call those witnesses who, from their connection with a transaction in question are able to testify on the material facts. If such witness are within reach but not called without sufficient reasons

being shown the court may draw an inference adverse to the prosecution.”

Applicants did not call two witnesses from Chamawata who attended disciplinary hearing as their representative from their union, thus, adverse influence is drawn. Failure to bring such a witness made adverse inference imperative by the court as was stated in the case **Msere Kibago Vs. Prime Catch Exports Ltd, Rev.No. 15/2015, where the court held.**

96. "I entirely and respectfully agree with the position above and that the Director who was a material witness to prove the fact that he was the victim of applicant's misconduct in his office, his failure to testify in the commission at no apparent reasons would entitled this court to draw an inference that the applicant did not commit any misconduct.... adding.

And the Director indeed feared to tell lies before the Commission lest he could be punished [Our re-emphasis].

Failure to produce important witness in court and especially when the said witnesses are available has been received with disfavor by courts, for examples in the same case Msere Kibago Vs. Prime Catch Exports Ltd, the court further, said ***"if for some undisclosed reasons a party fails to call a material witness on his side, an inference will be drawn that if the witness was called could have given evidence adverse to the party's interest."***

Legally failure to bring in court the necessary available witness impedes justice, it is on that grounds court have been allowed to draw adverse inference to the defaulting party.

I thus join hands with the respondent counsel that, applicant denial of disciplinary hearing is an after thoughts. Thus, conclusion by arbitrator that procedure for disciplinary hearing was not followed it is totality wrong. Such order is quashed and set aside. Before winding up, I wish to blame applicant counsel Mr. Baltaza Kitundu for not saving respondent counsel submission as ordered by the court on 30th June, 2020. Respondent counsel Evans Ignace addressed the court on the a normally on 13nd August, 2020, after perusal of the court records on 22nd July, 2020. Advocate Christopher Mbuba who was representing applicant on that date, admitted to have not served respondent, as ordered by the court, he then asked to serve respondent in the eyes of the court. This is not health situation, court orders has to be respected and complied with. None compliance of court orders not only is disrespect, but create chaos on entire administration of justice. Advocates are officers of the court, thus they should be in the fore front to comply with court orders. None compliance of courts by it's own officers is an issue to be taken seriously. Having considered evidence on records, submission by both counsels, in totality application dismissed for want of merits.


Z.G. Muruke
JUDGE
09/10/2020

Judgment delivered in the presence of Advocate Evans Ignas for the respondent and in the absence of applicants having notice.


Z.G. Muruke
JUDGE
09/20/2020