IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 802 OF 2018

BETWEEN

SAID HASSAN.....APPLICANT

VERSUS

HANSOM TANZANIA LTD.....RESPONDENT

JUDGMENT

Date of Last Order: 23/09/2020

Date of Judgment: 09/10/2020

A. E. MWIPOPO, J

The applicant herein namely **SAID HASSAN** has prefered this Revision application praying for the Court to revise the proceedings and the decision pronounced by Commission for Mediation and Arbitration in the labour dispute no. CMA/DSM/ILA/R.415/15/684. The applicant is praying to the Court for the following orders:-

1. This Honourable Court be pleased to call for records of proceedings of labour dispute no. CMA/DSM/ILA/R.415/15/684 by the Commission for Mediation and Arbitration at Dar Es Salaam Zone

(Hon. Nyagaya, P.), reverse it and set aside the whole Award of the Arbitrator.

2. This Honourable Court be pleased to revise and order that there were no good reasons advanced by the Respondent to warrant termination of the employment on the ground of misconduct.
3. That this Honourable Court be pleased to revise and order the damages ordered by the Hon. Arbitrator were contrary to the law and therefore proceed to award damages as directed by the law.
4. That the costs of this application be provided for.
5. Any other reliefs this Honourable Court deems fit to grant.

The application is supported by the affidavit of the Applicant. The affidavit contains four legal issues as follows:-

1. That the Arbitrator erred in law and fact by awarding two months' salary as damages contrary to the requirement of the law.
2. That the Arbitrator erred in law and fact for failing to award a one month salary as annual leave by shifting burden of proof to the employee contrary to the requirement of the law.
3. That the Arbitrator erred in law and fact by declaring that there was a valid reason to terminate the employment while there was no proof to that effect.

4. The Arbitrator erred in law and fact by failing to award the employee the remaining 6 months contractual salaries contrary to the requirement of the law.

The short history of the dispute is that: the Applicant was employed by the Respondent Hansom Tanzania Ltd as Operator from September, 2014 and was terminated on 20th June, 2015, for misconduct. Dissatisfied by the employer's decision, the Applicant referred the dispute to the CMA where the Commission awarded the applicant to be paid by the respondent Tanzania Shillings 1,500,000/= being 2 months' salary compensation for procedural unfair termination and one month salary in lieu of Notice of Termination. Aggrieved by the CMA decision the Applicant filed the present application for revision.

The Applicant was represented by Mr. Ngemelwa Sixbert, Advocate, whereas the respondent were not found even after the service of summons was effected by way of publication on 16th June, 2020 through Mwananchi newspaper. On 13th July, 2020, the Court ordered hearing of the application to proceed in *exparte*. The Court also ordered for the hearing of the application to proceed by way of written submission. The Applicant filed his submission in support of the application as ordered.

The Applicant submitted on each of the four grounds of the revision as contained in the affidavit. On the first ground of revision that the Arbitrator erred in law and fact by awarding two months' salary as damages contrary to the requirement of the law, the Applicant submitted that section 40 (1) (c) of the Employment and Labour Relations Act, 2004, provides that if the Arbitrator or the Labour Court finds a termination is unfair, the Arbitrator or Court may order the employer to pay compensation to the employee of not less than twelve month's remuneration. The Arbitrator discretion is limited to not less than twelve months' remuneration but in the present application the Arbitrator issued an award for two months' salary compensation only. The Commission Award is improper as there was no proof of valid reason for termination and the procedure for termination was not followed. The applicant cited case of **NMB vs. Leila Mringo & 2 Others**, Civil Appeal No. 30 of 2018, Court of Appeal at Tanga, (Unreported),; and **Amina Ramadhani vs. Staywell Apartment Ltd**, Revision No. 461 of 2016, High Court, Labour Division, at Dar Es Salaam, (Unreported). The Applicant prays to be awarded with 12 months' salary compensation for unfair termination.

The Applicant's second ground of revision is that the Arbitrator erred in law and fact for failing to award a one month salary as annual leave by shifting burden of proof to the employee contrary to the requirement of the

law. Submitting on the ground the Applicant argued that by virtue of Rule 9 (3) of the Employment and Labour Relations (Code of Good Practice) Rules, G.N. No. 42 of 2007, the burden of proof in termination cases lies with the employer. The Arbitrator shifted the burden of proof as found in page 9 of the Award where he held that the applicant failed to prove payment of one month's salary as annual leave. It was the duty of the Respondent to prove that Applicant's annual leave was paid. Section 44 (1) of the Employment and Labour Relations Act, 2004, provides that employer shall pay an employee before termination among other benefits any annual leave pays. Thus, the Applicant is praying for the payment of the annual leave.

The Applicant submitted on the third ground of revision that the Arbitrator erred to hold that the reason for the applicant's termination was valid. However, the Respondent's evidence adduced during hearing failed to prove that it was the Applicant who committed the crime. As the alleged Applicant's misconduct was attempt to steal which is a criminal offence, its proof must be beyond the reasonable doubts and at present application there are several doubts as to whether it is the applicant who stole the pump. The Applicant cited the case of **Elia Kasalile & 17 others vs. The Institute of Social Work**, Civil Appeal No. 145 of 2016, Court of Appeal of Tanzania,

(Unreported), where it was held that the reasons for termination being not fair or unreasonable amounts to unfair termination.

The fourth and last Applicant's ground of revision is that the Arbitrator erred in law and fact by failing to award the employee the remaining 6 months contractual salaries contrary to the requirement of the law. The Applicant submitted on the respective ground that the Arbitrator was supposed to award six months' salary remaining in the contract of employment which was unfairly terminated. This is in addition to other benefits for unfair termination as provided under section 40 (2) of the Employment and Labour Relations Act, 2004. The Applicant prayed for the Court to award the Applicant with six months' salary remaining in the respective contract, one month salary in lieu of notice of termination, unpaid annual leave, one month's salary for the unpaid work done and compensation for 24 months' salary.

From the submissions, issues for determination are as following hereunder:

i. Whether there was valid reason for termination of Applicant's employment.

ii. Whether the procedure for termination was fair.

iii. What are remedies to the parties?

It is unlawful for an employer to terminate the employment of an employee unfairly. This is provided by section 37 (1) of the Employment and Labour Relations Act, 2004. The Act provides further in section 37 (2) that the termination has to be on the basis of valid reason and fair procedure. Section 37 (2) reads as follows:

> 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.

The above provision is read together with Rule 9 (3) of the Employment and Labour Relations (Code of Good Practice) Rules, G.N. No. 42 of 2017 which provides that the burden of proof lies with the employer but it is sufficient for the employer to prove the reason on a balance of probabilities.

From those provisions, it is the duty of the employer to prove that the termination of employment is fair. And the termination of employment is considered to be fair if it is based on valid reason and fair procedure. In the case of **Tanzania Railway Limited V. Mwajuma Said Semkiwa, Revision No. 239 of 2014, High Court Labour Division at Dar Es Salaam**, this Court held that:-

> *"It is 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".*

Now, turning to the first issue for determination whether there was a valid reason for termination of Applicant's employment, the Employment and Labour Relations Act, 2004, provides in section 37 (2) (a) (b) (i) that a termination of employment by an employer is unfair if the employer fails to prove that the reason for the termination is valid and that the reason is a fair reason related to the employee's conduct.

The evidence available in record shows that the Applicant was terminated after he was found guilty for the offence of an attempt to steal grease pump. The testimony of Charles Matoba – DW1 prove that the Applicant on the 19th June, 2019, unlawfully tried to take out of his work

station the grease pump belonging to his employer but DW1 did not allow it. DW1 raised an alarm and informed about the incident to the supervisor Happy – DW2. The Applicant did run away from the area with the pump and tried to hide it in the container. When the Applicant came back to the gate he had no pump with him and said that he did not take the pump. DW1 tried to find where the pump is but he did not find it. The pump was found inside the excavator the next day and it was covered with dust.

DW1 testimony is supported by the testimony Happy John Changala - DW2, the Administrative Officer of the Respondent Company. DW2 testified that she heard the alarm ringing and she went to the gate where she was informed by DW1 that the applicant was trying to take the pump out of the station illegally but he did not let him take it. They tried to find where the pump was hidden but they did not find it until the next day where they find the pump covered with dust inside the excavator which was operated by the Applicant on previous date. This evidence is sufficient to prove that the Applicant attempted to steal the grease pump. The attempted stealing misconduct is among the acts which may justify termination for gross dishonesty under Rule 12 (3) (a) of the Employment and Labour Relations (Code of Good Practice) Rules, G.N. No. 42 of 2007. Thus, I'm of the same opinion as the Arbitrator that the evidence available is sufficient to prove the

misconduct. As a result, I find that the reason for termination was valid and fair.

The second issue for determination is whether the procedure for termination was fair. The evidence available in record shows that the next day when the Applicant reported to the office he was asked about the incident and was handled termination letter. There was no inquiry conducted or the disciplinary hearing before termination of his employment. The procedure for termination of employment contract for misconduct which is provided under Rule 13 of the G.N. No. 42 of 2007, was not adhere at all by the employer. For that reason, the termination of the Applicant employment was unfair procedurally as rightly heard by the trial Arbitrator.

The last issue is, what are the remedies to the parties? The evidence available shows that the Applicant was employed under a fixed term contract for one year commencing on 1st January, 2015 and was ending on 31st December, 2015. At the time of termination on 20th June, 2015, there was still 6 months' left in the employment contract. The employment for fixed term contract terminates in accordance to the agreement.

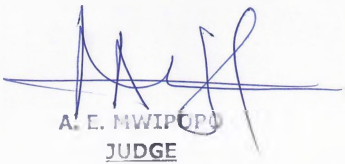
According to Rule 4 (2) of the G.N. No. 42 of 2007, where the contract is a fixed term contract, the contract shall terminate automatically when the

agreed period expires, unless the contract provided otherwise. The present fixed term contract was terminated for misconduct 6 months' before its expiry date. Where a contract has been breached which in this case was unfairly terminated, the party who suffers by such a termination is entitled to receive, from the party who has broken the contract, compensations for any loss or damage caused to him thereby. In the present case, the reason for the termination was valid but the procedure was unfair. Thus, the Arbitrator rightly held that the applicant is entitled to compensation for less than the remaining period of the Contract which is 6 months' salary. The Arbitrator Awarded the Applicant with compensation for two months' salary. Thus, the Arbitrator Award was justified and legally awarded. As the employment contract was for a fixed term contract, the suffered party compensation was not supposed to exceed the benefits expected to be received for the remaining period of contract. For that reasons the Applicant's claims for compensation for not less than 12 months have no basis.

On the Applicant's claims for the payment for the period of work done before termination and the leave pay, I agree with the Applicant submission that the Respondent failed to prove that the same was paid to the Applicant. DW2 testified that the documents to prove those payment were in the office

but the same were not tendered. Therefore, I find that the Applicant was not paid annual leave pay and salary for the work done for the period before termination. Thus, the Respondent is supposed to pay the Applicant shillings 500,000/= being annual leave pay and shillings 400,000/= for the work done for the period before termination. The total amount to be paid for the Applicant for the annual leave and work done before termination is 900,000/=.

Therefore, the Revision Application is partly allowed to the extent discussed here in. In addition to shillings 1,500,000/= which was Awarded to the Applicant by the Commission for Mediation and Arbitration, the Respondent has to pay the Applicant shillings 900,000/= for the unpaid annual leave and salary for the work done before termination. Each party to carry his own cost.



A. E. MWIPOPO
JUDGE
09/10/2020