IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 293 OF 2019

FALCON INDUSTRIES LIMITED ..... APPLICANT

VERSUS

CHARLES LUSEKELO AND 2 OTHERS ..... RESPONDENTS

10/09/2020 & 22/10/2020

JUDGMENT

BANZI, J.:

The Respondents, Charles Lusekelo, (1st Respondent), Juma Mohamed (2nd Respondent) and Omary Hashim (3rd Respondent) were employed by the Applicant in 2005 on a position of Machine Operators. On 15/01/2010 an incident occurred whereby some raw materials used for manufacturing pipes were stolen from the Applicant's premises. As a result, Respondents and one Denis Kabyela were arrested and arraigned before Ilala District Court for the offences of breaking and stealing. On 20th December 2012 the Respondents were convicted and conditionally discharged not to commit any offence of the same nature within three years. In addition, they were ordered to pay the Applicant Tshs 14,560,000/= as compensation for the stolen goods. After the conviction, the Respondents referred the dispute at the Commission for Mediation and Arbitration ("the CMA") at Dar es Salaam claiming for their unpaid salaries pending criminal proceedings.

The Arbitrator after concluding that the Respondents were never terminated, ordered the Applicant to pay them a total sum of Tshs.30,256,800/=. However, he directed Tshs.14,600,000/= to be deducted from the total sum to fulfil the compensation order of the District Court in criminal case against the Respondents. In the end, the Arbitrator ordered the remaining balance of Tshs.15,756,700/= to be paid to the Respondents. Being aggrieved with the said decision and award of the CMA, the Applicant lodged this revision.

When the revision was called for hearing, Mr. Mr Charo Shogholo, learned counsel appeared on behalf of Advocate Laurent Ntanga for the Applicant, whereas, Mr. Sammy Kateregga appeared as Personal Representative of the Respondents. By consent, the revision was argued by way of written submissions whereby, both sides complied with the scheduled order.

It was the contention of Mr. Ntanga that, following the arrest of the Respondents, the Applicant terminated their contract for the reason of gross misconduct. He cited rule 12 (1) (b) (iii) of the Employment and Labour Relations (Code of Good Practice) Rules, 2007 ("GN No. 42 of 2007") and insisted that, the Respondents were aware of the termination basing on the criminal case against them. He further submitted that, according to the misconduct committed by the Respondents, the Applicant had no any other option than to terminated them. To him, the Applicants followed all required procedures and hence termination was fair. Thus, he prayed for the revision to be allowed by quashing the proceedings and setting aside the award of the CMA.

On his part, Mr. Kateregga contended that, the Applicant through the affidavit and in the submission admitted that the Respondents were terminated on the ground of gross misconduct. If that was the case, then it contravened section 37 (5) of the Employment and Labour Relations Act, No. 6 of 2004 ("ELRA") because the section prohibits any disciplinary action in form of penalty or termination against the employee charged with criminal offence until final determination. He added that, there was no formal suspension as per rule 5 (1) of GN No. 42 of 2007 hence the fact that the Respondents were denied access to the Applicant's premises contravened the law. In case there was suspension, yet, there was no proof that their salaries were paid to them in accordance with rule 27 (5) of GN No. 42 of 2007. He cited the case of **Pee Pee Tanzania Ltd v. Shabani Juma Omary** [2015] LCCD 9 to support his point. He concluded that, since the Respondents were not terminated, they should be paid their remunerations from the date they were charged until the date of judgment of this Court. Therefore, he prayed for the revision to be dismissed.

After careful consideration of parties' arguments and grounds for revision in the light of evidence on CMA record, the issues that call for my determination are, one *whether the Respondents were terminated from their employment* and two, *whether the Respondents were entitled to unpaid salary.*

Section 37 (5) of the ELRA 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.*** *"*[Emphasis is mine].

What I gathered from the excerpt above is that, the law prohibits termination of an employee who has been charged with criminal offence until the case or any appeal thereto is finally determined. In other words, no disciplinary proceedings shall be mounted against the employee who has been charged with a criminal offence which is subject matter to the misconduct. The rationale behind this restriction is to protect the employee from being subjected to two disciplinary hearing on the same fact.

However, the law allows for the employee who is charged with criminal offence to be suspended on full remuneration pending final determination of the case and any appeal thereto. This is provided under rule 27 (5) of GN No. 42 of 2007 which reads as follows;

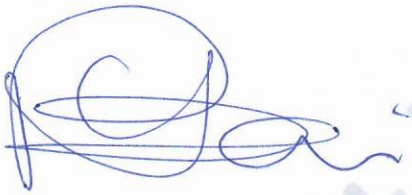
> *"Notwithstanding the provision of section 35 of the Act, an employee charged with a criminal offence may be suspended on full remuneration pending a final determination by a court and any appeal thereto, on that charge."*

Reverting to the matter at hand, although the law permits but there is no evidence to establish that the Respondents were suspended on full remuneration pending the final determination of the criminal charges in criminal case number 45 of 2010 before the District Court of Ilala. Likewise, although it would be contrary to the law, but there is no evidence establishing that the Respondents were terminated when the said criminal case was still pending. Assuming the Respondents were terminated as alleged by the Applicant, but still no termination letters were tendered

neither by the Applicant nor the Respondents to prove the same. Also, there was no scintilla of evidence to establish that the provisions of rules 12 and 13 of GN No. 42 of 2007 were complied with. The mere allegation that the Respondents did not show up to the workplace from the moment they were resealed on bail is not the conclusion proof of their termination. Besides, there was also allegation from the Respondents that, upon being released on bail, they went to the workplace but were denied access to enter therein. Therefore, despite the fact that there was valid reason for termination, but the Applicant did not terminate the Respondents from their employment when the criminal case against them was still pending until it was determined. In that regard, it is the considered view of this Court that, the Respondents were still the employees of the Applicant from 15/01/2010 until 20/09/2017 when the dispute at hand was determined by the CMA.

Reverting to the second issue, although the Respondents committed misconduct but they were still the employees of the Applicant from the moment they were arrested up to 20/09/2017 when the dispute at hand was determined by the CMA. Therefore, in the considered view of this Court, the Respondents were entitled to the unpaid salaries as awarded by the Arbitrator. Before concluding, I find it necessary to comment on the prayer by Personal Representative of the Respondents to extend unpaid salaries until final determination of this matter before this Court. This prayer was not featured in the counter affidavit of the Respondents which is the substitute of oral testimony. It was also not contained in the evidence adduced by witnesses of both sides at the CMA. For that reason, I am constrained to agree with counsel for the Applicant because I don't find a reason to entertain a mere statement from the bar and the same is hereby rejected.

That being said, I find no reason to fault the decision of the CMA. Thus, I uphold the decision and the award of the CMA save for slight change on the amount to be deducted which according to the judgment in criminal case is Tshs.14,560,000/= and not Tshs.14,600,000/= as it was ordered in the award. The resultant, this revision is accordingly dismissed for want of merit.



I. K. BANZI
JUDGE
22/10/2020