IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

LABOUR REVISION NO. 337 OF 2019

BETWEEN

ULTIMATE SECURITY (T) LIMITED.....APPLICANT

VERSUS

ABUBAKARI ABDALLAH MKUPASI..... RESPONDENT

JUDGEMENT

Date of Last Order: 15/07/2020

Date of Judgement: 24/07/2020

Aboud, J.

The Applicant **ULTIMATE SECURITY (T) LIMITED** filed the present application seeking revision of the award of the Commission for Mediation and Arbitration (herein CMA) in Labour dispute no. CMA/DSM/KIN/R. 813/17/850 delivered by Hon. Mpapasingo, B, Arbitrator on 22/03/2019 in favour of the respondent herein.

The application is made under Section 91 (1), (a), 91 (2) (a) (b) (c) and 94 (1) (b) (i) of the Employment and Labour Relations Act, No. 6 of 2004 as amended by section 14 of the Written Laws (Miscellaneous Amendment) Act No. 3 Act No. 17 of 2010 and Section 94 (1) (b) (i) of the Employment and Labour Relation Act No. 6 of

2004 (henceforth the Act), Rules 24 (1), 24 (2) (a) (b) (c) (d) (e) (f), 24 (3) (a) (b) (c), 28 (1) (a) (b) (c) (d) (e) of the Labour Court Rules 2007 GN. No. 106 of 2007 (herein the Rules), and other enabling provisions of the Law.

The application was supported by the affidavit of **TATU ELIAS**, applicant's Human Resource Officer. The respondent challenged the application through his counter affidavit.

Brief facts leading to the present application are as follows; the respondent was employed by the applicant as a driver from 2011. The parties entered into numerous contracts. Upon termination the respondent was on a fixed term contract of two years commenced on 23/01/2017 and was agreed to end on 22/01/2019. The respondent claimed to be orally terminated on 18/07/2017 on the basis of unknown reasons. He referred the dispute to CMA where the Arbitrator decided on his favour and, he was awarded 19 months remuneration as the remaining period in the contract as well as the salary of June 2017. Dissatisfied by the CMA's award the applicant filed the present application.

The matter proceeded by way of written submission. During hearing the applicant was represented by Richard Liampawe,

Applicant's Principal Legal Officer while the respondent was represented by Mr. Joseph Basheka, Personal Representative.

Arguing in support of the application Mr. Richard Liampawe submitted that, the respondent took annual leave without the employer's permission, an action which was against section 31(3) of the Employment and Labour Relations Act, [CAP 366 RE 2019], herein the Act.

He averred that, the Honourable Arbitrator did not consider that, the applicant never breached the respondent's employment contract but rather the respondent disappeared from work without following procedures. Mr. Richard Liampawe added that, the Arbitrator also did not consider the evidence from the applicant's witness (DW2) that they took some measures to contact the respondent but he was unavailable.

He further submitted that, the Honourable Arbitrator did not consider that during arbitration hearing the respondent failed to produce any evidence to prove that he was granted leave permission by the employer. Mr. Richard Liampawe went on to submit that, the Arbitrator erred in law and fact in awarding 19 months compensation

without considering that the respondent did not go to work for 36 consecutive days. That the first day in which the respondent reported back to work he had already lodged his complaint at the CMA. He added that the applicant failed to produce termination letter contrary to section 112 of the Evidence Act [CAP 6 R.E 2002]. To beef up his argument he cited the case of **Abdul Karim Haji vs. Raymond Nchimbi Alois & Joseph Sita Joseph** [2006] TLR 420, where it was held that, it is elementary principle that he who alleges is the one responsible to prove his allegation.

Mr. Richard Liampawe also stated that, the Arbitrator was wrong to order payment of the salary of June, 2017 to the respondent while he was absent from work for the whole month. He therefore prayed for the application to be allowed.

In reply Mr. Joseph Basheka submitted that, it is not true that the respondent absconded from work for the period of 36 days because he worked throughout until 18/07/2017, when he was verbally terminated by the applicant's Human Resource Manager namely Patrick Sombe. He added that, since the applicant did not produce the posting sheet or register at the CMA the Arbitrator correctly held the applicant terminated the respondent's fixed term

contract which amounts to breach of contract. To robust his argument he referred the case of **Good Samaritan vs. Joseph Savari Munthu**, Rev. No. 165 of 2011 (unreported).

In respect of termination letter Mr. Joseph Basheka submitted that, the respondent was verbally terminated. As to section 112 of the Evidence Act he argued that, the said provision does not apply in this case due to the fact that, there is applicant admission in the affidavit that the respondent was terminated from employment. He told the Court that, the case of Abdul Karim (supra) is irrelevant in this application.

Mr. Joseph Basheka further submitted that, the respondent was condemned unheard when his contract was terminated without being given an opportunity to be heard on the allegation of misconduct. In support of his argument he cited the case of **Abbas Sherally & another Vs. Abdul Sultan Haji Mohamed Fazal Boy**. Civ. Appl. No. 33 of 2002.

As regard to the award, Mr Joseph Basheka submitted that the Arbitrator was correct to award the respondent compensation of 19 months remuneration due to the fact that his contract of employment was for a fixed term of two years. He referred the case of **Tanzania**

Saruji Cooperation Vs. African Maible Company Limited [2004] TLA CA.

Mr. Joseph Basheka added that the above position was also observed in the cases of Good Samaritan (supra) and the case of **The Tanganyika Farmers Association Limited Vs. Njake Oil Company Limited**, Civ Appl. No. 40 of 2005 (unreported). He therefore prayed for the application to be dismissed and the Arbitrator's decision be upheld.

Having gone through the Court's records as well as submissions by both parties, it is my considered view that the issues for determination before the Court are, firstly, whether there was breach of employment contract. Secondly is whether the Arbitrator properly awarded the respondent.

On the first issue as to whether there was breach of employment contract, the applicant argued that the respondent was not terminated from work rather he absconded himself. I have careful examined the record, as rightly held by the Arbitrator the applicant did not tender any evidence to prove that the respondent did not go work. The applicant's witness, DW2 testified at the CMA that all

employees who report to work on each particular day are required to sign posting sheet, that being the policy of the applicant, is my view that the applicant ought to have tender the relevant document at the CMA to prove that the respondent did not sign posting sheet and, thus was absent from work. In other words there is no evidence on record to prove that the respondent absconded from work.

The applicant submitted that the respondent was required to tender evidence to prove that he was absent from work with permission from his employer. In my view the one who alleges has to prove as a matter of principle in law. Therefore, the fact that the respondent strongly disputed the allegation of his absence from work, the applicant as the employer had a duty to prove to the contrary. Under normal circumstances all documents concerning daily attendance of the employee at work such as attendance register are kept by the employer. Therefore, the applicant being the employer was the responsible and right person to tender evidence to prove that the respondent was absent from work for the alleged period of 36 days.

It is a trite law that in all proceeding concerning unfair termination it is the duty of the employer to prove that the

termination is fair. This is the law position under the provision of section 39 of the Act which is to the effect that:-

> "In any proceedings concerning unfair termination of an employee by an employer, the employer shall prove that the termination is fair."

On the basis of the above provision, the applicant's submission that the respondent had to prove his absence from work has no legal stand. It has to be noted that in labour matters the burden of proof on fairness of termination lies to the employer as discussed above. Therefore the cited case of **Abdul Karim Haji** (supra) by the applicant where it was held that, it is elementary principle that he who alleges is the one responsible to prove his allegation cannot apply to the present application as rightly submitted by the Mr. Joseph Basheka.

Moreover assuming that it is true the respondent absconded from work for more than five days as alleged, the law required applicant to take action against him for absenteeism. This position is also aligned with the applicant's Policies Manual which was tendered

at the CMA. According to the relevant Human Resource and Company Policies Manual (Exhibit A2), at page 15 it provide that:-

> "Any employee who takes unauthorized leave or **is absent from work for without permission or reasonable explanation** shall be subject to disciplinary action".
>
> (Emphasis is mine)

From the above legal position the applicant was supposed to take disciplinary action against the respondent due to the alleged misconduct, that he was absent from work for about 36 days. However, no disciplinary action was taken against him and, the applicant just decided to stop paying the respondent's monthly salary. It is on record that the respondent wrote a letter to the applicant demanding explanation why he decided to stop his salary but there was no response. Such an act draws an inference that the applicant decided to terminate the respondent.

On the other hand the applicant alleged that he unsuccessfully took all the efforts to search for the respondent. However, from the record there is no any proof of efforts or measure taken by the applicant to that effect. The respondent tendered postal receipt

(Exhibit B1) to prove that he posted the letter to the applicant inquiring for his salary areas, so in my view that was the proper mode of communication which the applicant would have also used to summon the respondent to explain reasons for his absence.

On the basis of the foregoing discussion, with no hesitation I say that the applicant breached the respondent's contract of employment by terminating him without any justifiable reasons and before the expiry of the agreed period of such contract. Moreover the respondent was terminated without adhering to termination procedures stipulated under the Act, to wit section 37 (2) of the Act and Rule 8 of the Employment and Labour Relations (Code of Good Practice) G.N.No.42 of 2007. Section 37 (2) of the Act provides that:-

> "(2) A termination of employment by an employer is unfair if the employer fails to prove:-
>
> (a) That the reasons for 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".

On the last issue as to whether the Arbitrator properly awarded the respondent, it is on record that before the CMA the respondent was awarded with 19 months remuneration as the remaining period of the contract and the payment of salary for the month of June, 2017. On the basis of the discussion above I am of the view that the Arbitrator correctly awarded the respondent. It has been the established principle and practice of this Court that where a contract of employment is unfairly terminated before expiry of the agreed period, the employee is entitles to the salaries of the remaining period of the contract. This is the position in the cases of **Tanzania Saruji Cooperation** (supra), where it was held that:-

"Where an employer terminates a fixed term contract the loss of salary by the employee of the remaining period of unexpired term is a direct foreseeable and reasonable

consequence of the employer's wrongful action".

That is also the position in the case of Good Samaritan (supra) and the Court of Appeal case of **The Tanganyika Farmers Association Limited** (supra). Therefore the respondent is entitles to the salaries of the remaining period of the contract as rightly awarded by the Arbitrator.

As regard to the salary payment of June, 2017 the same was rightly awarded by the Arbitrator due to the reason that, the applicant's through his witnesses who testified at the CMA admitted to have stopped paying the respondent's salary from June, 2017.

In the result I find that the applicant unfairly terminated the respondent's employment contract before the agreed fixed term. Thus, the application has no merit. I hereby uphold the Arbitrator's award to the respondent and dismiss the application accordingly.

It is so ordered.

I.D. Aboud
JUDGE
24/07/2020