IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

DAR ES SALAAM

REVISION NO. 904 OF 2019

BETWEEN

CSI ELECTRICAL LIMITED ..... APPLICANT

VERSUS

SADICK DEVID MPONDA ..... RESPONDENT

JUDGEMENT

Date of Last Order: 20/04/2021

Date of Judgement: 07/05/2021

Aboud, J.

The applicant, **CSI ELECTRICAL LIMITED** filed the present application seeking revision of the decision of the Commission for Mediation and Arbitration (herein CMA) delivered on 18/10/2019 by Hon. Mbena, M.S. Arbitrator in Labour Dispute No. CMA/DSM/KIN/1040/18/325. The application is made under section 91 (1) (a), 94 (1) (b) (i) and section 91 (2) (c) of the Employment and Labour Relations Act [CAP 366 RE 2019] (herein referred as the Act); Rule 24 (1) 24 (2) (a) (b) (c) (d) (e) (f) 24 (3) (a) (b) (c) (d) of the Labour Court Rules GN. No. 106 of 2007 (herein referred as the

Labour Court Rules). The applicant moved the court to determine the following issues:-

i. Whether it was proper for the Arbitrator to conclude that there was no valid reason of terminating the employment contract of the respondent.
ii. Whether it was proper for the Arbitrator to conclude that the reason for termination was not proved while the evidence was tendered before her.
iii. Whether it was correct for the burden of proof to lie on the applicant hence the dispute was breach of contract.

Briefly, the respondent was the employee of the applicant employed as a Driver/Messenger for a fixed term contract of one year commencing on 06/02/2018 and agreed to end on 05/02/2019. It is on record that on 07/08/2018 the respondent had an accident while driving the applicant's vehicle with registration No. T895 DJQ. The applicant alleged that, the respondent failed to give correct report of the incident as per Company procedure which caused the Company's vehicle to remain at the police station for 16 days.

Being dissatisfied by the respondent's conduct the applicant summoned him before a disciplinary hearing where he was found guilt for being dishonesty. Following such findings of the Disciplinary Committee the applicant terminated the respondent from his employment on 27/09/2018. Aggrieved by the termination the respondent referred the dispute to the CMA claiming for breach of contract. The CMA decided the dispute in favour of the respondent and awarded him salaries of the remaining period of the contract. Being resentful by the CMA's award the applicant filed the present application.

Throughout the proceedings in this Court the respondent neither entered appearance nor respondent to any of the documents despite being served. Therefore, the court proceeded to determine this application ex-parte. The matter was argued by way of written submission whereas the applicant appointed Ms. Jenniffer Euphrazi, her Human Resource Supervisor to be his representative.

On the first issue it was submitted that, the Arbitrator erred in law and in fact to conclude that the applicant's reason for terminating the respondent was not valid despite the testimony given by the applicant's witness proving the act of gross dishonesty. It was added

that the reason for termination was also revealed in the termination letter which mentioned and emphasized that the Company could not tolerate the respondent's conduct. It was further submitted that, the respondent was not terminated for causing accident but rather for dishonest resulted from withholding critical information of the accident or filing a report as per Company procedures. To justify the reason for termination the said representative cited Rule 12 (1) of the Employment and Labour Relations (Code of Good Practice) GN 42 of 2007 (herein GN. 42 of 2007).

It was further submitted that, the Hon. Arbitrator failed to analyze and examine the evidence on whether the respondent's termination was fair and the procedures were followed. It was strongly submitted that, the evidence on record clearly proved the misconduct of gross dishonesty. To strengthen her submission the applicant's representative referred the court to the case of **Leonidas Ngonge Vs. DAWASCO**, Lab. Div. DSM Rev. No. 382 of 2013 (unreported).

On the second issue the representative reiterated her submission in the first issue. She added that, the Arbitrator merely relied on the termination letter in reaching to the decision while

disregarding the testimony of DW1 and other evidence tendered. It was further submitted that notification for inviting the respondent to disciplinary hearing was issued on 17/09/2018 and the letter written by the respondent to confirm the use of the Company's money was written on 19/09/2018.

It was also submitted that, it was fair and just for the applicant to terminate the employment contract with the respondent since the core of the employment relationship is trust and the respondent breached the same for being dishonesty.

On the last issue it was submitted that, the respondent should have been the first to prove his allegation of breach of contract since he was the one accusing the applicant for such allegation. To strengthen her submission, she cited Rule 24 (3) of the Labour Institutions (Mediation and Arbitration Guidelines) GN. 67 of 2007. It was added that, the Arbitrator erred on the proceeding against the law since the allegation was not for unfair termination which would require the applicant to be the first to prove the allegation. She therefore urged the court to revise and set aside the Arbitrator's award.

After considering the submission of the applicant's representative, I find that there are four issues to be determined by the Court. The first issue is whether it was correct for the burden of proof to lie on the applicant for the dispute of breach of contract, secondly is whether the applicant proved the misconduct levelled against the respondent, thirdly is whether the applicant followed laid down procedures in terminating the respondent's employment and lastly is to what reliefs are the parties entitled.

On the first issue as to whether the burden of proof to lie on the employer for the dispute of breach of contract, the applicant alleged that in accordance with Rule 24 (3) of GN. 67 of 2007 the respondent was the one who was supposed to start adducing his evidence because the matter was for breach of contract. The relevant provision is to the following effect:-

> *'Rule 24 (3) The first party to make an opening statement shall present its case first throughout the proceeding, if the parties do not agree about who shall start, the Arbitrator shall be required to make a ruling in this regard.*

Provided that, in a dispute over an alleged unfair termination of employment, the employer will be required to start as it has to prove that the termination was fair'.

On the basis of the above quoted provision, it is true that in cases other than unfair termination the first party to make an opening statement shall be the first to start adducing his/her evidence. In this application it is true that the respondent referred the dispute of breach of contract at the CMA as reflected in the CMA F1. However, looking at the nature of the breach in my view, it is purely based on termination of employment. Under such circumstances it was correct for the applicant to start adducing his evidence as the nature of the breach was based on the alleged unfair termination.

It is an established principle of law that in civil cases the burden of proof is on balance of probabilities where the court or CMA will consider evidence of both parties regardless of who started the case first. What is paramount important is the right to be heard which in this case was afforded to both parties as reflected in the CMA proceedings. In the event I find the ground that the burden of proof was shifted to the applicant lacks merit and is hereby dismissed.

As to the second issue of whether the applicant proved the misconduct levelled against the respondent. It is an established principle of law that employers are allowed to terminate the employment of their employees only if they have fair reason to do so and follows fair procedures. This is in accordance with Rule 8 (1) of GN. 42 of 2007 which is to the effect that:-

> *'Rule 8 (1) An employer may terminate the employment of an employee if he:-*
> *(a) Complies with the provisions of the contract relating to termination;*
> *(b) Complies with the provisions of sections 41 to 44 of the Act concerning notice, severance pay, transport to the place of recruitment and payment;*
> *(c) Follows a fair procedure before terminating the contract; and*
> *(d) Has a fair reason to do so as defined in section 37 (2) of the Act'.*

In the application at hand the respondent was terminated for dishonesty that he failed to report the accident incident timely to the police and to the applicant as in accordance with the applicant's rules. The record reveals that the accident incident occurred on 07/08/2018. The applicant wants this Court to rely on the police

report (exhibit C3) to believe that the respondent did not report the incident timely as contested. I have gone through the contents of the relevant exhibit and it only shows the date of the inspection which was on 22/08/2018, the name of the owner of the damaged vehicle, driver's name and the extent of the damage. The exhibit in question does not clearly state when was the matter reported to the police so as to enable this court to ascertain the disputed delay. In the relevant exhibit there is no any information implicating the respondent that he did not report the matter within time to the police and the employer.

In my view if the applicant wishes this court to rely on the exhibit C3 such an evidence should have been collaborated with other evidence. However, such an exhibit as it stands does not prove the misconduct of dishonesty as charged. The said Company's procedures were not even revealed neither at the Disciplinary Hearing nor before the CMA. Furthermore, in the disciplinary hearing there was no sufficient evidence tendered to prove the misconduct in question as evidenced by the Disciplinary minutes (exhibit C5). Under such circumstance I join hands with the Arbitrator that the applicant did not tender sufficient evidence to prove the misconduct in question.

On the third issue as to whether the applicant followed procedures in terminating the respondent. The procedures for terminating an employee under misconduct as it is in this matter are well elaborated under Rule 13 of GN. 42 of 2007 of which I find no relevance to reproduce. In the matter at hand, as correctly found by the Arbitrator the applicant followed laid down procedures in terminating the respondent's employment. It is on record the respondent was served with the notice to attend disciplinary hearing on 17/09/2018 as evidenced by exhibit C4 where he was informed his right to be represented and to have witnesses. On 20/09/2018 the respondent appeared before a disciplinary hearing where witnesses were summoned to testify on the charged misconduct. However, as stated in the first issue the evidence presented was not sufficient to prove the misconduct in question.

On the last issue as to parties' reliefs, in the CMA F1 the respondent prayed for salaries of the remaining period of the contract. It is an established principle that the compensation award in any unfair termination of fixed term employment contract is based on the remaining period of such contract. This is the position in the case

of **Salkaiya Seif Khamis Vs. JMD Travel Services (SATGURU)** Lab. Rev. No. 658 of 2018 HC DSM (unreported).

Also in the case of **Benda Kasanda Ndassi V. Makufuli Motors Ltd.**, Rev. No. 25 of 2011 HC. DSM (unreported) it was held that:-

> *'In the circumstances when termination is unfair and is of a fixed terms contract, the award of compensation of remaining period is appropriate.'*

On the basis of the above position, the respondent is entitled to compensation of five (5) months being the salary of the remaining period of the contract and not four (4) months which were wrongly calculated by the Arbitrator.

In the result since it is found that the applicant failed to prove fair reason for terminating the respondent's employment contract and followed fair procedures, I find the present application has no merit. Consequently, the applicant is ordered to pay the respondent five (5)

months remuneration being remuneration of the remaining period of the contract.

It is so ordered.

I.D. Aboud

JUDGE

07/05/2021