IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 34 OF 2020

EMMANUEL LAURENT SANGA ..... APPLICANT

VERSUS

VIGU TRADING CO. LTD..... RESPONDENT

(From the decision Commission for Mediation & Arbitration of DSM at Kinondoni)

(**Mpapasingo**: Arbitrator)

Dated 13th December 2019

in

Labour Dispute No. CMA/DSM/KIN/1002/18/316

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JUDGEMENT

4th November & 8th December 2021

Rwizile, J

The applicant has filed this application against the decision of the Commission for Mediation and Arbitration to be referred as the Commission. It is made under section 91(1) (a) (b), (2) (a) (b) (c) and section 94 (1) (b) (i) of the Employment and Labour Relations Act, No. 6 of 2004, Rule 24 (1), (2) (a) (b) (c) (d) (e) (f), (3) (a) (b) (c) (d) and Rule 28 (1) (c) (d) (e) of the Labour Court Rules, GN No. 106 of 2007. The applicant is therefore praying for the following orders; -

1. That the Court be pleased to call for CMA records and revise the whole award of commission for mediation and arbitration dated 13th December 2019, Before Hon. Mpapasingo, B arbitrator.
2. Any other relief the Court may deem fit and just to grant.

Mr. Kombe, Personal Representative represented the applicant and Mr. Emmanuel, learned advocate represented the respondent. Hearing of the application proceeded by way of written submissions.

Arguing for the application on first and second grounds Mr. Kombe submitted that applicant was terminated by the respondent but the arbitrator did not consider the evidence of applicant. He said, the award was relying on evidence of the respondent. He submitted that the applicant was not proved to have absconded from work.

On third ground, it was submitted that the award was unlawfully procured by ruling out that applicant terminated himself from his duty while the arbitrator held that the applicant went to the headquarters at Post for three days without any instructions and so the applicant was already terminated.

It was further submitted that the arbitrator had a duty to be satisfied that the applicant terminated himself from employment. The employer, it was argued has the duty to prove the termination. It was submitted further that; this finding was contrary to what Dw1 and Dw2 admitted. They said

that applicant's termination was initiated by the employer due to misconduct and had several warnings issued against the applicant. It was his view that the same was not considered by the arbitrator in his findings.

Opposing the application, it was submitted that the Arbitrator did take into account the evidence given by the applicant. Further, it was found that same evidence of the applicant is devoid of merit. This can be easily seen at page 4 and 7 of the award. He stated that, it is clear that the arbitrator took into account and considered the evidence adduced by the applicant. Therefore, as correctly observed by the Arbitrator, the applicant was not terminated by the respondent as there is no proof of termination of his employment. Rather the applicant opted to abandon his employment by unjustifiably making himself absent from work.

On the third ground, it was submitted that the arbitrator's award was not unlawfully procured, not illogical and not irrational. It was stated that the award did not hold that the applicant went to the headquarters of the respondent. Further, all facts were considered by the arbitrator, and nowhere during the trial the applicant testified that he was already terminated until the day the he was told to handle the car to another driver. It was added that even using the simple reasoning being told to

hand over the car to another driver does not amount to termination of employment at all.

Considering the testimony of Pw1, Dw1 and Dw2, the arbitrator was satisfied that the applicant terminated himself as stated at page 8 and 9 of the award. Further, nowhere in their testimony Dw1 and Dw2 admitted that the applicant was terminated by employer for misconduct. It was denied that the applicant was terminated from employment. It was testified that the applicant was warned, and when was required to explain about his absence, he did not reply and to their amazement, he served the respondent with a summons from the Commission. It was therefore clear to the respondent that he could not proceed with a disciplinary hearing because the applicant had terminated his employment. Therefore, the arbitrator considered everything that was raised and testified by all parties. The court was asked to dismiss this application.

Having considered submissions and the CMA record, I have to say, this Court is called upon to determine, *whether the applicant's employment was terminated? And if so, was it fair substantively and procedurally?*

To start with the first issue, I have to comment that in allegations of unfair termination the legal position is that the employer owes the legal duty to prove fairness of the same. But once the employer disputes that there was no termination then the burden of proof shifts to employee to prove

the same as per section 60(2) of the Labour Institutions Act. The law therefore states that the one who alleges that a right or protection conferred by any labour law, has been contravened shall prove the facts of the conduct to constitute the contravention. This, as well, is in line with section 112 of the Evidence Act, which states that the burden of proof lies on the person who alleges existence of a particular fact.

The applicant contended that he was terminated by the respondent but the arbitrator did not consider the evidence of the applicant by relying on evidence adduced by the respondent and confirmed that the applicant absconded from work.

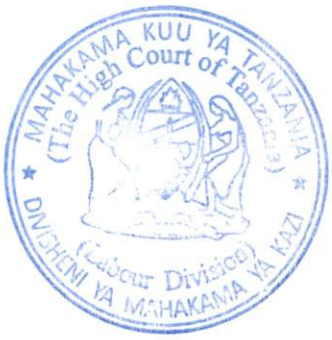
On the other hand, the respondent maintained that applicant's evidence was considered but the same failed to support his allegation relating to unfair termination. This is why, it was disregarded and this clearly is indicated at page 7 of the award. The evidence available reveals that the applicant was issued with warning letter on 19th June 2017 as evidenced by exhibit D1. The same was supported by Dw1 on his testimony that the applicant absconded from work and decided to file the matter at Commission.

Also, it is on record that until 17th September 2018 the applicant was still in employment, after first warning and on that day, he got into conflict

with his boss. On 21st September 2018, he was given notice to give explanation for that offence. However, the same was not replied by the applicant. On 26th September 2018, the charge sheet was issued by the respondent purposely to initiate the disciplinary proceedings. The applicant being aware of the proceedings filed the matter at Commission on 27th September 2018 as evidenced by the CMA Form No. 1. As evidence available speaks for itself that applicant intend to bar his employer from conduct disciplinary hearing. His allegation of being not served with notice of explanation lacks merits.

In the case of **Joshua Nassary vs Speaker of the National Assembly of the United Republic of Tanzania and Another,** Miscellaneous Civil Cause No. 22 of 2019, High Court of Tanzania at Dodoma, (unreported), the Court held that *it is not proper for the applicant, to file the application without first exhausting the remedies available under the parliamentary standing orders.* The law therefore insists on the need to exhaust the remedies available within a particular institution before resorting to judicial remedies. The applicant was not enjoined to block termination process but to wait for it and then challenge the same. Running away from it, was a remedy that could not be resorted to by filing the dispute of termination which was not due.

From the above, I am of the view that applicant was not terminated by the respondent as the dispute was filed at CMA pre-mutually. On that basis, there is no unfair termination. Since the first issue has been answered in the negative, then I find no need to deal with the next issue on reliefs. It is enough to dismiss the application without an order for costs.



A.K. Rwizile

JUDGE

8.12. 2021