

**IN THE HIGH COURT OF TANZANIA**  
**LABOUR DIVISION**  
**AT DAR ES SALAAM**  
**REVISION NO. 268 OF 2020**

**KARIAKOO MARKETS CORPORATION..... APPLICANT**

**VERSUS**

**MRERO S MGHENI.....RESPONDENT**

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

**(Kiangi : Arbitrator)**

dated 29<sup>th</sup> day of May 2020

in

Labour Dispute No. CMA/DSM/ILA/R.617/17/847

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**JUDGEMENT**

19<sup>th</sup> November & 20<sup>th</sup> December 2021

**Rwizile, J**

By the letter dated 28<sup>th</sup> June 1996, Karikaoo Market corporation employed the respondent in permanent terms of employment. His employment as market clerk was with effect from 11<sup>th</sup> July 1996. He worked for her until and he successfully rose to the rank of Manager of Business and Planning, the post he held until 22<sup>nd</sup> May 2017, when he was terminated. The reasons for termination were that he failed to make proper supervision of the market and for providing untrue personal information when applying for the job, and to admit before the commission of inquiry that he got

zero in his form IV exams and alleged had completed standard four, while that information was not true.

Following his termination, the respondent filed a dispute with the Commission for Mediation and Arbitration, claiming for terminal benefits amounting to the sum of 251,781,000/=. The Commission heard the dispute and found termination was unfair and so ordered payment of terminal benefits as the product of unfair termination to the tune of 59,617,620/= along with certificate of service.

The applicant was aggrieved, he filed this application as usual by the chamber summons supported by an affidavit sworn by Mr. Charles J Sombe a human resource manager of the applicant. Paragraph 4 of the affidavit raised three issues for determination, but only one point was argued. It is coached in the following terms;

*That the Arbitrator erred in law and fact for awarding the respondent on ground that he was not given a right to be heard contrary to evidence adduced thereto.*

To argue this application orally before this court was Mr. Oresto Nyalika advocate for the applicant. Mr. Isaack Tasinga was an advocate of the respondent. Mr. Nyalika was view that the respondent was heard by the independent commission. In his view, the CMA did not take into

consideration the evidence to that effect. He further briefly argued, that payment made to the respondent was to be subjected to taxation. He therefore prayed the application be granted. The award be quashed and set aside.

On his part, Mr. Tasinga was straight to the point that the award clearly shows how the independent commission heard the matter but terminated him for the offence not charged with.

He was of the view that the application is frivolous, it should be dismissed with costs. He concluded that since the issue of tax was not discussed before the CMA, it should not be entertained.

Having heard the submission of the parties, and having gone through the records of the CMA, it is matter of principle to examine *if termination was fair*. Termination is a creature of the law. Under section 37 of the Employment and Labour Relations Act, termination occurs in two ways. First, termination that is fair and second, to the contrary, that which is unfair termination. It is unlawful therefore to terminate one's employment unfairly since subsection (1) of section 37 so provides. But having legalized unfair termination, subsection 2 of the same section provides, that the reasons for termination must not only be valid but also fair and



that it must be grounded on fair procedure, (section 37(2) (a), (b) and (c)). Still, the same section is vehement that the duty to prove fairness of termination is cast on the employer. This is also clearly stated under section 39 of the Act.

The applicant, before the CMA procured evidence from its witness. According to her evidence, the respondent's termination started with complaints from the Kariakoo business men. The same were sent to the Ministry as well as to the Municipal council. This prompted an inquiry initiated by the Permanent Secretary to the President's Officer, Regional Administration and Local Government. The respondent was informed of the complaints and required to answer the same. The team was commissioned to investigate the same and the respondent was informed of its findings via exhibit MR5. This is a letter dated 27<sup>th</sup> March 2017, entitled ; *kutakiwa kuwasilisha majibu ya hoja zilizoibuliwa na kamati ya uchunguzi iliyoundwa na katibu Mkuu Ofisi Rais TAMISEMI*. Page two of the same letter asked him to answer two issues; namely

- i) Kutofutwa kwa taratibu za kugawa maeneo ya biashara kwa kutotangaza nafasi hizo pamoja na kupangisha wafanyabiashara bila mikataba*
- ii) Upotevu wa mapato kufuatia kutokuwepo kwa mikataba ya upangishaji wa baadhi ya maeneo ya biashara.*

Following this letter, the respondent replied on 29<sup>th</sup> March 2017, which allegation were denied. The respondent was suspended from employment to pave way to investigation on 4<sup>th</sup> April 2017 via SMK/HO/343/62. This letter referred to the same points raised in the letter dated 27<sup>th</sup> March 2017. On 22<sup>nd</sup> May 2017, the respondent was terminated. The termination letter was referring to the board meeting held on 16<sup>th</sup> May 2017 which discussed the report of the independent commission created after his suspension. In this letter, it was clear that the respondent had failed to perform his duty and admitted to have failed in the form 4 exams by scoring division zero. He was therefore terminated in the following terms;

*i. Kukiri mbele ya tume ya uchunguzi kuwa ulipata daraja la sufuri kwenye matokeo ya mtihani kidato cha nne*

*Hivyo Basi bodi ya Wakurugenzi iliamizia yafuatayo dhidi yako;*

*ii. Kusitishwa kwa nafasi yako ya ajira kwa kuwa ulitoa taarifa zisizo sahihi kwa mwajiri wako wakati wa uombaji wa ajira yako kuwa ni mhitimu wa kidato cha nne huku ukifahamu kuwa taarifa zako hazikuwa sahihi.*

From the foregoing, it is as clear as crystal, that the applicant terminated the respondent based on the above letters.

It is follows to me that; termination was grounded on giving false information. Tracing from where it started, the following issues are



apparent; **First** that the complaints that paved the way to an investigation were not the reasons for termination. **Second**, the respondent was informed of the investigation and its finding and was asked to respond to its finding without being involved in the process of investigation. I am saying so because there is no evidence that shows, the team that was formed before his suspension called him to answer the claims. He only met the letter asking him to answer allegation level against him after the preliminary investigation.

**Third**, upon suspension, the commission that dealt with his investigation produced a report that was not tendered before the commission. **Fourth**, the applicant did not prosecute the respondent for any disciplinary offence. If it did, then there is no evidence such as the charge sheet stating the disciplinary offence he committed. **Fifth**, the respondent was terminated by the board following the commission's findings on the offence he was not never charged with. **Sixth**, the respondent was not heard because there were no charges against him, that were heard and proved committed.

Lastly, there is no proof that as the respondent was applying for employment, he claimed to have not completed form 4. There is no such evidence and therefore the applicant was simply targeted the respondent. There was no proved of misconduct that would merit termination. This

means therefore, the commission was right in its finding that termination was with no valid reasons.

On the second aspect, is on procedural fairness. In order to prove he committed those offences, there were strong reasons to conduct thorough investigation. It is on record that investigation was conducted. The respondent alleges, the investigation team was appointed, but no disciplinary hearing team was formed. This means, before the respondent was investigated, there was already a decision to terminate him. Rule 13(1) of the Code of Good Practice, provides, there must be investigation first, to establish if there is a need for conducting a disciplinary hearing. The reason and purpose envisaged by the law is as clear as crystal; **First** is to be sure if there is a prima facie case for the employee to answer during the disciplinary hearing and if there is a need to go that far, **second** and most importantly, to establish the extent, gravity and seriousness of the misconduct. **Third**, to form an opinion, such that if proved at the hearing, the type of the penalty to be imposed. This is to say, does misconduct merit termination right away or contemplate some other forms of punishment if available. Having complied with this mandatory procedure, then other very important stage is to furnish the investigation report to the employee who has been investigated. This stage is crucial in the sense that the employee has to prepare for a

defense. Since none of the above was done. It is safe to hold that there was no fair procedure and therefore termination as whole was unfair. In actual fact, there was total disregard of Rule 13 (1) to (10) of the Code of Good Practice. I agree with the finding of the commission that termination was unfair. I therefore dismiss this application. It so with no order as to costs.



  
**A.K. Rwizile**

**JUDGE**

**20.12.2021**