

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
LABOUR DIVISION
(AT DAR ES SALAAM)

REVISION NO. 465 OF 2020

BETWEEN

TAZAMA PIPELINE LIMITED APPLICANT

VERSUS

MATHEW NYAMWASA RESPONDENT

JUDGEMENT

S. M. MAGHIMBI, J.

The applicant in this revision is inviting this court to call for original records of the Commission for Mediation and Arbitration (CMA) file in Labor Dispute No. CMA/DSM/TEM/723/18/15/19 decided by Hon M. Batenga, Arbitrator on the 25/09/2020. Having so called the records, the applicant is moving the court to examine such proceeding and its award to satisfy himself as to correctness and rationality of ultimate findings that the respondent was unfairly terminated. That after satisfying itself as to the correctness and rationality of such records, the court be pleased to revise and set aside the findings that ordered reinstatement of the respondent and determine the matter in the manner it considers appropriate. The application was lodged by a notice of application and Chamber Summons supported by an affidavit pursuant to the provisions of Section 91(1)(a)

and (b), 91(2)(a),(b), 91(4), (a) & (b) 94(1),(b),(i) of the employment and Labour Relation Act No. 6 of 2004, Rule 24(1); 24(2)(a),(b),(c),(d),(e),(f); 24(3)(a),(b),(c),(d); & Rule 28(1)(d) & (e) of the Labour Court Rules GN. No. 106/2007.

The dispute arose out of the following context; the respondent herein was the applicant's employee as a driver until 27/11/2018 when his employment was terminated on reason of dishonest conduct and using company property for personal gain as per various documents that were produced before the CMA including, among others, EXTP3 which was the charge form, EXTP6 which was the termination letter and EXTP9 which was the investigation report. After the termination of his employment by the applicant, the respondent referred the matter to the CMA which after hearing both parties, the CMA held that the termination was substantively and procedurally unfair and order the respondent to be re-instated. The applicant was aggrieved by the decision of the CMA hence, filed the instant application on the following grounds: -

- i. Whether it was proper for the trial Arbitrator to invalidate the lawful procedure for termination of the respondent employment on the ground that there was no reason for termination of employment.

- ii. Whether it was proper for the trial Arbitrator to reinstate the respondent and order the payment for loss of remuneration from the date of termination to the date of execution of the award.
- iii. Whether the trial Arbitrator properly evaluated the evidence laid before the CMA and the law in arriving at his findings.

In this court, Ms. Glory Venance, Learned Counsel was for the applicant whereas Mr. Lucas Nyagawa, Learned Counsel appeared for the respondent. Hearing was held orally on the 18/10/2021.

Submitting on the first issue on whether it was proper for the trial Arbitrator to invalidate the lawful procedure for termination of the respondent employment on the ground that there was no reason for termination of employment; Ms. Venance submitted that the CMA confirmed that the procedure for termination of employment was followed but still ordered the respondent to be reinstated on the reason that there was no basis for termination. she argued that the respondent's employment was terminated for dishonesty and using company property for personal gain as reflected in show cause letter and charge sheet (Exhibit TP3), disciplinary hearing minutes (exhibit TP6) and investigation report (exhibit TP9). That there was sufficient evidence to prove that the

respondent committed the charged misconducts pointing to the oral and documentary evidence that showed the respondent failed to account for fuel that he takes from the applicant, his employer, and failure on part of the respondent to account for that fuel.

She submitted further that during the disciplinary hearing and investigation, the respondent admitted to have filled 20 litres of fuel in the car instead of 176 that was alleged to have been taken from the employer. She argued that the respondent knew that after taking the fuel he was supposed to fill the same in the fuel car log book which was admitted by the CMA as EXTP2. That the respondent himself admitted that he did not fill the book because the superior officers fill their own fuel and they don't make any follow ups on them.

Ms. Venance submitted further that the evidence that the respondent took 176 litres of fuel was proved by DW1 who was the plant operator who filled the said 156 litres of fuel in the car that was driven by the respondent and 20 litres in a plastic container. She pointed the evidence to page 2 and 3 of the award arguing that it was the direct evidence of the person who filled the respondent's car with such amount of fuel and when the investigation started on the following day the 14/05/2018 the respondent's car was found to have only 20 litres of fuel. She went on submitting on the

procedural aspect which the CMA found to be proper hence I need not bother to reproduce them.

In reply, Mr. Nyagawa submitted that there is no place in the records of the CMA that the arbitrator invalidated the procedures used by employer. Rather she approved the same despite that the evidence available proves contrary that procedure was not followed. He then submitted that the respondent was charged for theft, dishonest and use employer's property for personal gain. According to the evidence available on the records, the applicant/employer failed to prove or discharge its burden to prove that termination was fair because the reason was not valid.

Replying on the submission of the applicant that the respondent employee failed to account 176 litres of fuel that was filled in the car driven by the respondent and 20 of which were filled in a jerrycan (dumu). Mr. Nyagawa submitted that if you read the evidence of DW1, Mr. Thobias Ngalya, he testified that he filled the vehicle with 146 litres and 20 litres in a dumu while DW2 testified that he saw 143 litres being filled in the vehicle. He pointed out that in the investigation report, the same person who saw the situation said that the vehicle was filled with 150 litres. But

during the disciplinary hearing, the same person said that the litres which have been filled were 147 litres.

He submitted further that according to EXP9, a security guard Mr. Kakuru Tungaraza said that inside the vehicle he didn't see any container or jerrycane on the 3 times that the vehicle went out of the working premises. That also DW1 testified that after they filled the vehicle with the fuel they put to records the litres that were filled. He then argued that there was a material contradiction of the testimonies of these three witnesses who actually have seen an action. It is from the records that the one who reports about the theft of fuel was DW2, who reported the issue to the DW3. The DW3 had information that there is allegation of theft, despite that he was in charge of this information, according to the shift report prepared by in charge, he reported that there was no fuel theft or any problem at the workplace for the shift that he was in charge. He then submitted that when there is this material contradictory evidence, it proves that actually the respondent was never filled with that fuel alleged.

I will determine the issue in context with the fairness of the substance of termination. The respondent was terminated on ground of theft, dishonest conduct and using company property for personal gain. He was alleged to have stolen 150 litres of fuel. The applicant paraded 5

witnesses during arbitration proceedings. Their evidence is to the effect that during the disciplinary hearing and investigation, the respondent admitted to have filled 20 litres of fuel instead of 176 that was alleged to have been taken from the employer. The respondent knew that after taking the fuel he was supposed to fill the same in the fuel car log book which was admitted by the CMA as EXTP2. That log book was never filled and when he was asked why, he admitted that he did not fill the book because even the superior officers fill their own fuel and they don't make any follow ups on them.

Looking at the records, the evidence that the respondent took 176 litres of fuel was proved by DW1 who was the plant operator who filled the said 156 litres of fuel in the car that was driven by the respondent and 20 litres in a plastic container. In cross examination of this witness his evidence was not shaken as the advocate only relied on petty issues of differences between container (dumu) and bucket and the like. Therefore the evidence of DW1 showed that he received a message to fuel the respondent's car and he filled it with 156 litres and 20 litres were filled in a dumu. The evidence was supported by that of DW2 who testified to have seen the respondent's car being filled with fuel. At the time he took a glance of the car there were already 147 litres filled and still counting.

There was also DW3 tendered EXTP-2 which showed that the respondent did not account the fuel in the book.

At this point, I am in agreement with the argument put forth by Ms. Venance that proof in civil cases is on balance of probability and not beyond reasonable doubt as in criminal cases. Since this is a labor dispute, the CMA should have considered the pieces of evidence that connected the respondent to the allegations charged against him. There was direct evidence that DW1 who filled the respondents car with 156 litres of fuel and 20 litres in a plastic container and his explanation was admitted as exhibit TP1 and on the investigation report he said the same thing about the litres of petrol and was the same he said during disciplinary hearing EXTP5. Further to that, there was also a stock taking in the respondent's car. He alleged to have filled only 20 litres in the car the incident day. Then there was evidence that he took 3 trips on that day and the investigation team found the exact same 20 litres in the car the next morning. It is impossible to imagine that the car went out three times and the remaining fuel was the same 20 liters filled in the car the previous day. All the doubts about the amount and quantity of the fuel taken would be cleared if the respondent filled the in exhibit TP2 as it was required.

Up until this point, I find that during arbitration hearing, the applicant adduced sufficient evidence to prove the substance of termination of the respondent. The CMA's finding that the termination was substantively unfair was unfounded and it is hereby set aside. This court makes a finding that the termination of the respondent was substantively fair. Since there is no dispute that the procedures for termination were properly followed, then it is my conclusive finding that the termination of the respondent was fair both procedurally and substantively. Owing to that, the application beforehand is hereby allowed. The award of the CMA is hereby revised and set aside.

Dated at Dar es Salaam this 08th day of December, 2021.



A handwritten signature in blue ink, consisting of stylized cursive letters, positioned above a horizontal dotted line.

S.M. MAGHIMBI
JUDGE