

IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT MOROGORO

REVISION NO. 03 OF 2021

ALLIANCE ONE TOBACCO TANZANIA LIMITED.....APPLICANT

versus

HALFAN ABDALAH..... RESPONDENT

JUDGMENT

31st August & 6th September 2021

Rwizile J.

ALLIANCE ONE TOBACCO TANZANIA LIMITED has lodged the present application for revision against the award of Commission for Mediation and Arbitration in respect of Labour Dispute No. CMA/DSM/KIN/R.300/18/106. The applicant is seeking revision for the following orders:

1. That the Hon. Court may be pleased to call for the records, revise and set aside the whole award of the Commission for Mediation and Arbitration at Morogoro Zone (Hon. Matalis, R, Arbitrator) in respect of Labour Dispute No. CMA/DSM/KIN/R.300/18/106 dated 04th December, 2019.

2. That the Hon. Court may be pleased to determine the matter in the manner it considers appropriate.
3. Any other reliefs that the Hon. Court may deem fit and just to grant.

The Application is supported by the affidavit of **Sabatho Musombwa** applicant's Principal Officer.

Paragraph 5 of the Affidavit contains four legal issues arising from material facts. The respective legal issues are as follows; -

- i. Hon. Arbitrator erred in law and fact by failure to appreciate evidence of the applicant and consider that on balance of probabilities the applicant proved that the respondent was fairly, substantively and procedurally terminated.
- ii. Hon. Arbitrator erred in law and fact by holding that since applicant's activities involve paper works, hence, the missing of the documentation to prove the alleged misconduct led to unfair termination of the respondent's employment contract. Therefore, completely ignored the evidence of applicant's eye-witness.

- iii. That the honourable Arbitrator erred in law and facts to state that the applicant did not follow the laid down procedure in terminating the respondent.
- iv. That the Hon. Arbitrator erred in law and facts by awarding the respondent to the tune of TZS. 9,512,084.4/= and failed to consider that the respondent had already his terminal benefits package.

In brief, the applicant was employed by the respondent as a foreman on 16th December 2004. His employment, however, ended on 21st June 2018 when his was terminated for the reason of misconduct. Dissatisfied with the respondent's decision, hence the present application.

On hearing, the applicant was represented by Mr. Woiso, Advocate, whereas the Respondent was represented by Mr. Zongwe, Personal Representative from (TPAWU).

Supporting the application Mr. Woiso submitted that there was enough evidence to prove the matter, because documents were not the sole evidence. Oral evidence was given by Dw1 and Dw2 and the hearing proved that the respondent had received nothing as tobacco leaves even

though he said, he did so. The document he admitted was lost upon termination and the same evidence was not opposed. To support his submission, he cited the case of **Abas Kondo Gede v Republic**, Criminal Appeal No. 472 of 2017, High Court of Tanzania, at Dar es salaam, (unreported).

Opposing the application Mr. Zongwe submitted that applicant had no good reason to terminate the respondent's employment, the evidence adduced by Dw1 and Dw2 did not prove the case. Dw1, he argued, produced exhibit D1 showing tobacco (Mitumba) were received by Asha Kambi. He stated that there was no evidence but same were received on 13th June 2018, by Asha Kambi. It was Mr. Zongwe's contention that the alleged evidence that the documents were lost is misplaced because it did not future at the Commission. The case cited by the respondent, according to him, is distinguishable. In this case, he argued exhibit D1 was received but shown it was received before the time alleged. It was therefore baseless.

Regarding termination procedure, Mr. Zongwe submitted that the applicant failed to observe procedure in terminating respondent's employment. He stated that there was no investigation conducted to initiate disciplinary hearing contrary to Rule 13(1) of the Employment and Labour Relations

(Code of Good Practices) G.N No. 42 of 2007, (the Code). The investigation must be done upon having grounds for disciplinary hearing.

Pw1 and Dw4, in his view, proved so and the second hearing was done by relying on the evidence adduced in the former hearing.

In his rejoinder, the applicant's counsel submitted that the document in question was lost and it could not be recovered and the same was admitted by the respondent during the hearing. The evidence on record shows that the tobacco bales were received but they were not present in the store about fifty of them. It was further argued that, Dw1, gave evidence on the matter and said he did not find the seal on 50 tobacco bales as alleged but only found one. Basing on the circumstance of this case that investigation led to the disciplinary hearing.

It was further submitted that the law was followed and CMA did not consider Rule 13 of the Code. The same ought to be considered in its totality and no single provision. Strengthening his submission, he cited the case of **National Micro-Finance Bank PLC v. Ismail Amos Mwampulule**, Revision No. 6 of 2013, High Court of Tanzania, at Dar es salaam (unreported). He thus prayed for the award to be set aside.

Having considered parties submissions, CMA's record this Court find worth to determine two issues, that is;

- i) Whether respondent's termination was both substantive and procedurally fairly?
- ii) What are reliefs entitled to the parties?

Termination is said to be fair if it complies to section 37 of the Employment and Labour Relation Act, [Cap 366 R.E 2019] which provides that: -

"A termination of employment by an employer is unfair if the employer fails to prove-

(a) that the reason for the 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."

Again, in the case of **Tanzania Revenue Authority v. Andrew Mapunda**, Labour Rev. No. 104 of 2014, this court held that: -

"(i) It is the established principle that for the termination of employment to be considered fair it should be based on valid

security officer and he didn't question anything to justify process of loading or offloading tobacco bales resulted to loss of fifty (50) tobacco bales.

On such weakness it was alleged by the applicant that the empty (50) tobacco bales were received.

In the circumstance where by the respondent failed to explain before CMA how the tobacco bales were received, which resulted receiving of 50 empty tobacco bales. I am of the view that on such amount of bales the applicant committed serious misconduct and cannot be trusted for allowing fifty empty tobacco bales to be received as he was employed for the same duty. Therefore, the respondent's allegation that tobacco passed through other department lacks merits as the same cannot exclude the respondent from liability since all offences were as a resulted bad performance of the department he was heading.

Now under Rule 12 (3) (a) and (d) of the Employment and Labour Relations (Code of Good Practice) GN 42/2007 a misconduct is a good ground for termination. It provides that: -

The acts which may justify termination are-

(a) gross dishonesty;

(d) gross negligence.

This was so emphasized in the cases of **Saganga Mussa v. Institute of Social Work**, Lab. Div., DSM Consolidated Lab. Rev. No. 370 of 2013 and **Institute of Social Work v Saganga Mussa**, Consolidated Labour Rev. No. 430 of 2013.

In the instant matter there is no doubt that the allegations against the applicant amounted to a misconduct. Therefore, the applicant upon finding him guilty had a valid reason for termination by reason of misconduct. Having found that the reason for termination was fair the next question is whether the respondent's termination was procedurally fair.

In answering this question, as the termination was for misconduct the relevant provision is Rule 13 of the Code which provides that: -

"Rule 13(1) The employer shall conduct an investigation to ascertain whether there are grounds for a hearing to be held."

Now it is true that a right to be heard is a very fundamental one as provided for under Rule 13 of GN 42/2007. In the case of **Abbas Sherally & Another Vs. Abdul Sultan Haji Mohamed Fazalboy**, Civil Application No. 33 of 2002 (unreported) this court held that;

"The right of a party to be heard before adverse action or decision is taken against such a party has been stated and emphasized by the Court in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of the principle of natural justice."

Having cautiously gone through the record, the evidence available reveal that the respondent was charged as per exhibit P-2, reply to the same as per exhibit P-3 and he was afforded with an opportunity of appealing as testified. Basing on above discussion I concur with the applicant by citing the case of **NMB PLC v. ISMAIL AMOS MWAMPULULE**, Revision No. 6 of 2013, High Court of Tanzania, at Dar es salaam (unreported) that the requirement under Rule 13(1) to (13) of the Employment and Labour Relations (Code of Good Practice) G.N No. 42 of 2007 should be considered and weighed all together in order to establish if procedural fairness was followed. Since termination originated in the second hearing, one has to ask if there was indeed a second hearing within the meaning of the law. I doubt if it was, because, the letter that informed him of the second meeting was instructive. It told him, they have to rectify the procedural

irregularities, it interdicted him and directed him to leave the premises. These steps were not taken before, that means in the first meeting. The respondent was not fairly heard. The same went very fast and was terminated in few weeks' time from the first scenario. From the foregoing, I am bound to hold that termination was not fair. Therefore, this application is dismissed. I make no order as to costs.



AK. Rwizile

Judge

06.09. 2021