IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT MOROGORO

(ARISING FROM LABOUR DISPUTE NO. CMA/DSM/MORO/126/2018)

REVISION NO. 10 OF 2020

MOTOR –ENGIL, ENGENHARIA E. CONSTRACAO AFRICA.....APPLICANT

VERSUS

KASSIMU SALIM PAZI & 4 OTHERS..... RESPONDENT

JUDGMENT

31st August & 7th September 2021

Rwizile J.

The applicant has lodged the present application for revision against the award of the Commission for Mediation and Arbitration in respect of Labour Dispute No. CMA/DSM/MORO/126/2018. The applicant is praying for revision as follows:

1. That the Hon. Court may be pleased to revise, quash and set aside the award in respect of Labour Dispute No. CMA/DSM/MORO/126/2018 delivered by Hon. Kweka A.J dated 19th December, 2019 in favour of the respondent.

2. Any other relief this Honourable Court deems fit and proper to grant.

The application is supported by the affidavit of Richard Ally Bendera applicant's Human Resources Manager.

The issue for determination is *Whether the strike was legal and complied with the laid down procedure.*

The background of the dispute in brief is that; the respondents were employed by the applicant as Steel Fixers on different dates from 2018 to 14th June 2018 when they were terminated for the reason of unlawful strike. Dissatisfied with the applicant's decision, the respondents referred the matter to CMA, which decided the matter in their favour. The applicant was ordered to pay each of them, the remaining salaries to complete the term remaining in the contract of employment upon termination. The applicant was aggrieved, hence this application.

At the hearing, the applicant was represented by Mr. Kalasha, Principal legal Manager, whereas the respondent was represented by Mr. Ambakisye personal representative from TAMICO.

Supporting the application, Mr. Kalasha submitted that at Pg. 10 of the award, the respondents are quoted saying they could not work because they had no equipment. That was interpreted as a strike which lasted for 2 hours. At page 10 of the award, it was stated that the respondents did not know procedures for the strike. The learned counsel submitted that, the award ruled that there was an illegal strike. It was further submitted that the same was illegal as the respondents failed to comply with section 80 of the Employment and Labour Relation Act. The applicant was therefore right to suspend their employment.

The award be set aside, since the arbitrator held that the procedure for termination was complied with. Therefore, it was justifiable to terminate them.

Mr. Ambakisye, in replying, submitted that there was no good reason to terminate the respondents' employment. He said Pw1 and Pw2 testified that there was no strike whatsoever but they were demanding for equipment for their own safety on duty. The respondents were requesting for better working environment, that is why the applicant opted to terminate them.

Mr. Ambakisye argued that Rule 13 of the Employment and Labour Relations (Code of Good Practices) G.N 42 of 2007 demands investigation to be conducted so as to establish the reasonability of initiating disciplinary hearing. He stated that the applicant did not tender any investigation report. Therefore, the procedure for termination was not followed. It was his view that, the evidence of Pw1 and Pw2 is clear that the chairman of the meeting was a Human Resource officer. It was argued further that, he could not chair the meeting because he was there for the employer's interest. There is no evidence of the minutes of the disciplinary committee for the purpose of proving what happened, it was concluded.

In rejoinder Mr. Kalasha submitted that the reason for termination was apparent. Pw1 and Pw2 admitted that the respondent did not work for 2 hours. The word strike under section 4 is interpreted to include partial or total stoppage of work.

The acts of the respondents, he added, amounted to a strike. Dw2, a Police Officer who come to the scene proved so. He argued that Dw1 told the CMA clearly that the investigation results were orally submitted in the meeting i.e., disciplinary meeting and the report may be oral or written as under the law. Further it was submitted

that the Human Resource Officer was the secretary to the disciplinary meeting, but the award says it was chaired by Miguel Coster. Based on the said confusion, he asked the court to direct itself on exhibit D4 which is the minutes of the disciplinary meeting. The application be granted, the learned advocate asked this court.

After hearing the application, this court, I think is required to determine, *whether the respondent's termination was both substantive and procedurally fairly?* Termination is considered to be fair, if the employer acted in accordance with 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."*

It is an established principle of law that once there is an issue of unfair termination the duty to prove if the reason for termination was valid and fair lies on the employer. The case of **Tiscant Limited vs Revocatus Simba,** Revision No. 8 of 2009, High Court, Labour Division, at Dar Es Salaam and **Amina Ramadhani vs Staywell Appartment Limited,** Revision No. 461 of 2016, High Court Labour Division, at Dar Es Salaam), may be referred.

The respondents were terminated for the reason of conducting an unlawful strike. Section 80 of the Employment and Labour Relation Act, provides for the procedure of engaging in a lawfully strike. It states; -

> *Subject to the provisions of this section, employees may engage in a lawful strike if-*
>
> *(a) the dispute is a dispute of interest;*
>
> *(b) the dispute has been referred in the prescribed form to the Commission for mediation;*
>
> *(c) the dispute remains unresolved at the end of period of mediation provided under section 86(4) read with subsections (1) and (2) of section 87;*

(d) the strike is called by a trade union; a ballot has been conducted under the union's constitution and a majority of those who voted were in favour of the strike; and

(e) after the applicable period referred to in paragraph (c), they or their trade union have given 48 hours' notice to their employer of the intention to strike.

In the present application it is undisputed that the respondent stopped to work for two hours as testified by Pw1. Section 4 of the Employment and Labour Relation Act, defines "dispute of interest" *to mean any dispute except a complaint.* It also defines as "strike" *as a total or partial stoppage of work by employees if the stoppage is to compel their employer, any other employer, or an employer's association to which the employer belongs, to accept, modify or abandon any demand that may form the subject of a dispute of interest.*

The respondents opted not to work basing their claims not on dispute of interest since they were claiming to be furnished with equipment important for their safety when on duty, which includes eyes glass, groves, overall and safety boots. These were immediate complaints

which I think were essential for production in safe conditions. Dw1, a Human Resource officer, admit on his testimony that the respondents had their own claims. I have to say therefore that, based on the circumstances of the matter, the applicants had a lawfully course that demanded immediate action. Therefore, there was no valid reason for termination.

Regarding termination procedure, having found that the reason for termination was not fair, the next issue is whether the respondents' termination was procedurally fair. In addressing the same, as the termination was for misconduct, the relevant provision is Rule 13(1) of the Code of Good Practice which provides that: -

> *"The employer shall conduct an investigation to ascertain whether there are grounds for a hearing to be held."*

Apart from rival submissions regarding this aspect, it is from the record that the investigation report was not tendered at the disciplinary hearing committee or at CMA. Therefore, the same was not challenged by the respondent to enhance fair hearing. It is trite, that a right to be heard is very fundamental as provided for under Rule 13 of the Code of Good Practice. In the case of **Abbas Sherally**

& Another vs Abdul Sultan Haji Mohamed Fazalboy, Civil Application No. 33 of 2002 (unreported) it was 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."*

In this case, investigation report was not tendered regarding unlawfully strike or organizing the same. I am of the view that the respondents were denied the right to see and interrogate the report. Therefore, the procedural aspect was violated in terminating the respondents. The right to a fair hearing was infringed as held in the case of **Hamisi Jonathan John Mayage vs Board of External Trade**, Civil Appeal No. 37 of 2009 CA (unreported). I am therefore bound to hold that the application, has no merit, it is dismissed with no order as to costs.

AK. Rwizile
Judge
07.09. 2021