IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT MOROGORO

REVISION NO. 47 OF 2019

(ARISING FROM LABOUR DISPUTE NO. RF/CMA/MOR/85/2016)

BETWEEN

MISELI JUMA MWAMBO.....APPLICANT

AND

GROUP SIX INTERNATIONAL LTD.....RESPONDENT

JUDGMENT

27th & 02nd September 2021

Rwizile, J

MISELI JUMA MWAMBO has filed the present application against the decision of the Commission for Mediation and Arbitration herein to be referred as (CMA) in labour dispute No. RF/CMA/MOR/85/2016. The Applicant herein is praying for the orders of the Court in the following terms:

1. This Honourable Court be pleased to call for the records of the proceedings and award of the Commission for Mediation and Arbitration of Morogoro in Labour Dispute No. RF/CMA/MOR/85/2016 delivered by Hon. Kiobya, Z. Arbitrator, on 13th September, 2019.

2. Any other orders that this Honorable Court may deem fit and just to grant.

The Application is supported by the applicant's affidavit. However, respondent deliberately failed to appear and oppose the application despite proved due service.

It was factually stated that, the applicant was employed by the respondent as a Safety Officer under a contract for a specific task. Their relationship turned sour when he was accused of an attempt to steal. He was charged in court and ultimately could not be allowed to work for the respondent. This misunderstanding led the applicant to unsuccessfully file their dispute to the CMA. Dissatisfied with the CMA's decision, he has filed this application.

The application was heard exparte as the respondent failed to appear despite being duly served.

The applicant who appeared in person argued his application orally. Submitted before this court, the applicant said, he worked for 3 years with the respondent. He stated that, he was terminated from his employment upon being suspected of an offence of attempting to steal the company's property (door).

It was further argued that he was acquitted in court because he was not found guilty. He stated that his termination was done when the criminal case was still pending, since he could no longer be permitted to work. On such basis, he was of the view that the judgment of the trial court, in the said charges, is a proof that he was terminated illegally without being given terminal benefits.

Having heard the applicant and having gone through the CMA's record, it is pertinent to determine; -

i) Whether the applicant was employed by the respondent?

ii) Whether the applicant was terminated? And,

iii) If so, whether termination was fair?

I have to note herein that the onus of proving that there was an employment contract between the parties lies on the employer as provided under Section 15(6) of the Employment and Labour Relation Act, [Cap 366 R.E 2019] which states that;

> *"15(6) If in any legal proceedings, an employer fails to produce a written contract or the written particulars prescribed in subsection (1), the burden of proving or*

disproving an alleged term of employment stipulated in subsection (1) shall be on the employer."

It is undisputed that the applicant was employed by the respondent under specific task contract as testified by Dw1 at the CMA. When dismissing the applicant before the CMA, it was stated that the applicant failed to prove that he was indeed terminated. But the respondent did not supply necessary details to justify that the applicant was terminated fairly. Since the applicant was charged of a criminal offence and no evidence showing the applicant was still enjoying his remuneration before determination of criminal proceedings, it was then contrary to Section 37(5) of the Employment and Labour Relation Act. The evidence is therefore abundantly clear, the applicant was employed by the respondent as shown before and has not prove he was enjoying employment benefits before criminal charges were terminated.

The applicant was as held employee of the respondent. There is no evidence that he was not terminated as the respondent alleged at the trial, it goes without saying therefore that he was terminated. Section 37(2) of the Employment and Labour Relation Act [Cap 366 R.E 2019] provides that; -

(2) A termination of employment by an employer is unfair if the employer fails to prove-

(a) That the reasons for 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, and

(c) That the employment was terminated in accordance with a fair procedure."

It is on record that the applicant was accused of stealing the property(door) of his employer. He was then charged before the Primary Court as evidenced by exhibit MKJ-2(Judgement of Criminal case No. 443 of 2017). The criminal charges were terminated on 30th June 2017 when the applicant was acquitted. The respondent did not admit to have terminated the employment of the applicant. But the applicant alleges he was terminated. In the event that there was a criminal case, originated by the respondent it is not tenable to hold that the applicant simply walked away from his employment. This, means the respondent

took action against the applicant when the criminal case she originated was still pending. In such circumstance where the applicant was not found guilty in his criminal case, I am of the opinion that there was no valid and fair reason for termination.

For termination to be procedurally fair due to misconduct, the respondent to follow laid down procedure under Rule 13(1) of the Employment and Labour Relations (Code of Good Practice) GN No 42 of 2007, which provides that: -

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

There is no evidence proving that any of the procedure stated by law was followed in the process. The respondent simply testified that she did not terminate his employment. Failure to conduct the investigation and avail the employee with the investigation report is denying the respective employee with his right to defend himself from the allegations (see. **Severo Mutegeki and Another vs. Mamlaka ya Maji Safi na Usafi wa Mazingira Mjini Dodoma (DUWASA), Civil**

Appeal No. 343 of 2019, Court of Appeal of Tanzania at Dodoma).

For the foregoing it can be concluded that the applicant was terminated by the respondent. It goes without saying therefore that the procedure for termination was not fair. In such circumstance of not complying with the first procedure which is fundament one. In the case of **Tanzania Revenue Authority v Andrew Mapunda,** Labour Rev. No. 104 of 2014 it was held that: -

> *"(i) It is the established principle that for the termination of employment to be considered fair it should be based on valid reasons and fair procedure. In other words, there must be substantive fairness and procedural fairness of termination of employment, Section 37(2) of the Act.*
>
> *(iii) I have no doubt that the intention of the legislature is to require employers to terminate employees only basing on valid reasons and not their will or whims."*

From the foregoing, I think, I have to grant the application and quash the decision of the CMA.

On last issue regarding the reliefs to the parties, it is clear that the relationship between applicant and respondent turned sour in 2017 while the contract for specific task was to end on 2018, as testified by DW-1 and also by the applicant testified that his last payment was on March 2017. Since there was no any evidence adduced by the respondent on how payment was made to the applicant from the day their relationship turned sour. Then, he is to be paid the remaining term of the contract. This principle of awarding remaining period was restated in the case of **Good Samaritan vs. Joseph Robert Savari Munthu**, Rev. No. 165 of 2011 HC Labour Division DSM (unreported) where the Court held that: -

> *"When an employer terminates a fixed term contract, the loss of salary by employee of the remaining period of the unexpired term is a direct foreseeable and reasonable consequence of the employer's wrongful action...."*

Since it is not disputed that applicant was receiving Tsh 12,500/= per day X 30= Tsh 375000/ per month, excluding NSSF contribution as testified by DW-1. The applicant ought to be awarded as I hereby do eleven months (11) which means from March 2017 to January 2018.

This is equal to the amount of Tsh 4,125,000/= as a remaining period, other claims as indicated in CMA Form No.1 are not granted as there was no proof on the same.

Each party to bear its own costs.

A.K Rwizile

JUDGE

02.09.2021