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

REVISION NO. 854 OF 2019

SALEH HUSSEIN SALEH ..... APPLICANT

VERSUS

TANZANIA REVENUE AUTHORITY ..... RESPONDENT

JUDGEMENT

S. M. MAGHIMBI, J:

At the Commission for Mediation and Arbitration (the CMA) the applicant herein was the complainant in Labour Dispute No. CMA/DSM/ILA/06/19 ("The Dispute") which was decided by Hon. U.N. Mpulla, Arbitrator on 07/10/2019. He was aggrieved by the termination of his employment contract by his employer (the respondent herein), whereby he unsuccessfully lodged the dispute at the CMA which decided in favour of the applicant on the ground that the applicant was fairly terminated both substantively and procedurally. Dissatisfied by the CMA's award, the applicant filed the present application on the following grounds:

i. That the Honourable Arbitrator erred in law and facts in holding that the applicant was employed afresh by the respondent with new conditions.

ii. That the Honourable Arbitrator erred in law and fact in holding that the applicant/complainant submitted to the respondent the forged Certificate without any proof.

iii. That the Honourable Arbitrator erred in law and facts by concluding that the allegation of forgery was proved by the respondent without adhere to the standards of proof of the said allegation.

iv. That the Honourable Arbitrator erred in law and fact in holding that the respondent complied with procedure before terminate the complainant while there were ample evidence and testimony before him proving that the termination procedure was not followed by the respondent.

v. That the Honourable Arbitrator erred in law and fact when he failed to properly evaluate the evidence and testimonies before him and thereby arrived to an erroneous conclusion that the termination of the applicant was fair and the procedure for termination were adhered to by the respondent.

vi. That the Honourable Arbitrator erred in law and fact by ignoring the testimony of DW2 and PW1 hence injustice for the applicant.

vii. That the Honourable Arbitrator erred in law and fact by concluding that it was proper for the respondent to remove the applicant from payroll before he was charged and terminated.

viii. That the Honourable Arbitrator erred in law and fact by failing to analyse and take consideration the legal arguments that were put forward by Counsel for the applicant in the closing submission.

ix. That the Honourable Arbitrator erred in law and fact the applicants' prayers lacks merit and has no pegs on which to erect or leys its tent.

On the other hand, the respondent strongly challenged the application by filing a counter affidavit sworn by Ms. Jacqueline Chunga, learned Advocate. The application was disposed by way of written submissions; the applicant was represented by Mr. Heriel Munisi Learned Counsel, while Ms. Jacqueline Chunga, appeared for the respondent. I thank both Counsels for their well-researched and comprehensive submissions which shall be taken on board while disposing this application.

Having considered the parties submissions and the records of this application, I gather that the court is called upon to determine the following issues; firstly, whether the respondent proved the substantive reason for termination of the applicant, secondly, whether the respondent followed the proper procedures in terminating the applicant and lastly is what relief(s) to which the parties are entitled to.

On the first issue as to whether the respondent proved the substance of the termination of the applicant, having gone through the records, as per termination letter (exhibit D10) the applicant was terminated for forgery of Form Four Certificate (*kughushi cheti cha Elimu ya Sekondari*). As rightly submitted by Mr. Munisi, pursuant to Section 39 of the ELRA, it is the duty of the employer to prove that the termination was fair. It should further be noted that in civil cases like the one at hand, proof of the case is on balance of probabilities and not beyond reasonable doubt as Mr. Munisi would like this court to believe. In the cited case of **Sharaf Shipping Agency (T) Ltd v. Backlays Tanzania Limited & Another**, **Commercial case No. 115 of 2014** (unreported) the Court cited the case of **Omari Yusuph v. Rahma Ahmed Abdulkadr [1987] TLR 169** where it was held: -

'Allegation of fraud must be strictly proved. Although the standard of proof may not be as heavy as beyond reasonable doubt, something more than a mere balance of probability is required.'

After thorough examination of the evidence on record, I fully join hands with the Arbitrator that the respondent proved the misconduct levelled against the applicant. Firstly, the forged certificate was found in the applicant's personal file and no justifiable reason was adduced to counter the respondent's evidence on how the said certificate was found in that file. Mr. Munisi insisted that the applicant did not submit the alleged forged certificate, but looking at the evidence available, it is proved on balance of probability that he himself submitted the forged certificate to the respondent's office following the government's order of verification of educational certificates.

According to Ms. Chunga's submissions, the forgery allegations were proved by various evidences including the report of certificates verification from the office of treasure registrar dated 17th July, 2018 with reference No. CLC.21/344/04/01/10, the report on verification from NECTA (exhibit D5) and the personal particular form available at Head Quarters. There were also records available at Zanzibar office which are employment letter, personal particular forms and the form four

certificate with No. P. 00083/390 of 1990 of Hamamni Centre Zanzibar. This was also supported by the staff record form and verification of academic/professional certificates forms which proves that his level of education is form four. Hence it was proved that the applicant acted contrary to Part A of schedule 1 of the Public Service Regulations, 2003 read together with regulation 29 of schedule 2 of Staff Regulations, 2009 [RE 2016] together with Order D.12 of Standing Orders, 2009.

Secondly, in his application letter of employment (exhibit D13), the applicant specifically stated that his education level is Form Four, therefore the likelihood of submitting the forged certificate is high so as to prove the level of his education indicated in the application letter. I also fully agree with Ms. Chuga's submission on the circumstances which prove the applicant's submission of the forged certificate. Had he wanted to prove that he did not tender a forged certificate, the applicant was also duty bound to bring another certificate which is not forged so as to prove that he was actually holding the certificate that he alleged to have had when joining the respondent organisation.

On the basis of the foregoing analysis, I concur with the findings of the Arbitrator that in this case, the respondent had valid reason to terminate the applicant after he received report from the relevant

authority (NECTA) that the Form four certificate submitted by the applicant was forged one. He could not have continued to employ a person who had no qualification for the job.

I have noted the applicant's contention that he was not employed afresh by the TRA, to the contrary his contention is contrary to his employment contract with the respondent (exhibit D1) where it was specifically stated that employees from the Ministry of Finance were employed afresh by the respondent as per the new scheme of service.

The second issue is whether the respondent followed procedures in terminating the applicant. The procedures for terminating employees on the ground of misconduct are provided under Rule 13 of GN 42/2007. Examining the termination procedures applied by the respondent I am satisfied that he complied with the relevant Rule. The applicant wants this court to fault the Arbitrator's finding on the reason that he was not supplied with the investigation report prior to his attendance at the disciplinary hearing. Looking at the Notification to attend Disciplinary Hearing (Exhibit D6) the applicant was notified of the charge and the verification report from NECTA was accompanied therewith which was served to the applicant on 30/07/2018. On the same date the applicant was also served with the letter of verification of certificate (exhibit D5).

Reading the content of the two letters, in my view, they contain sufficient information to inform the applicant about the charge and the evidence available against him. Any defence that the applicant had would have been prepared on the basis of the served letters.

The applicant also alleged that he was not afforded the right to mitigate, much as I find the misconduct allegations levelled against him called for no other penalty than termination, I am also of the view that the procedures for termination are not supposed to be adhered in a checklist fashion. What the Court has to satisfy itself that the procedures were substantively followed to establish fairness on the applicant's basic right of fair hearing. (See also the position in the case of **Justa Kyaruzi v. NBC**, Revision No. 79 of 2009, Labour Court sitting at Mwanza). As held in that case, what is of paramount importance is that the applicant was afforded the right to be heard and for this case at hand, the same was fairly accorded to the applicant.

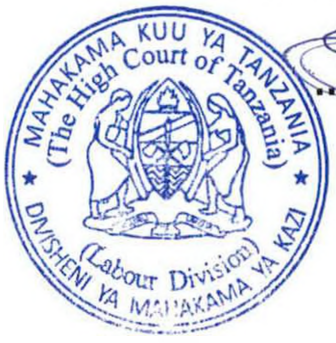
I am also not in disregard of the applicant's allegation that he was removed from the payroll before being heard. As rightly submitted by Ms. Chunga, after the report indicated that the applicant presented forged document it was unjustifiable to proceed paying the applicant while his allegation was still pending. In my view removing him from the

payroll, apart from complying to the government's order, was a practical decision because if he were removed mistakenly, he would have been refunded his lost salary as per Rule 38 (5) of the Public Service Regulations of 2003. On these findings, I find the second issue to be in favour of the respondent herein, the applicant's procedure for termination was fair.

On the last issue as to parties' reliefs, since it is found that the applicant's termination was fair both substantively and procedurally; he is not entitled to any of the remedies under Section 40 of the ELRA. For the reasons stated above, this application lacks merit and it is hereby dismissed accordingly.

It is so ordered.

Dated at Dar es Salaam this 20th October, 2021.



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S.M. MAGHIMBI
JUDGE