IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 371 OF 2020

SIMPLI SAFE SECURITY GROUP CO LTD..... APPLICANT

VERSUS

RAMADHANI JUMA MSANJA ..... RESPONDENT

(From the decision of the Commission for Mediation & Arbitration of DSM at Ilala)

(Gerald : Arbitrator)

dated 20th August 2020

in

REF: No. CMA/DSM/ILA/855/19/855

JUDGEMENT

20th September & 5th November 2021

Rwizile J.

The applicant has filed this application challenging the decision of the Commission for Mediation and Arbitration. She has petitioned this court to call for records of the Commission and revise the same.

The application is filed by chamber summons supported by the affidavit of Nyamachaguri Msamba Msenye. It has advanced grounds for which this

application is based. That is to say, *the award has material irregularity for awarding what was not pleaded, that the award has uneven assessment of the awarded amount, evidence and has made an incongruous finding in material facts.*

It has been factually stated that the applicant and the respondent were in employment relationship. The respondent was employed as security guard for a fixed term contract of employment which commenced on 1st September 2019. However, before it come to an end, the same was terminated on 28th October 2019. The reasons for termination are apparently not clear but it seems, he is alleged to have been absent from his duty for over 20 days. It has been further stated that the applicant when preparing to terminate him, she received a call from the Commission to answer the unfair termination dispute.

Upon, the alleged termination, the respondent successfully, filed a dispute with the commission claiming for terminal benefits. After a full hearing, the commission found that his termination was unfair. As a result, therefore, the respondent was ordered to pay 12 months' salary compensation, leave, severance pay, which amounted to the sum of 2,166,000/=. Aggrieved by which, this application has been filed.

The application was argued by way of written submission. The applicant was through its principal officer one Nyamachaguri Msamba Msenye, who also drafted the submission. On the other side, the respondent stood by himself but LRHC- Legal and Human Rights Centre assisted him to draft the submission.

The applicant, in answering the question whether termination was fair, he submitted that the commission held, it was unfair based on hearsay evidence. He submitted that, since there was no termination letter, it means there was no termination. He said, the permission letter gave the respondent seven days but he came days thereafter. It was his view that the respondent was not terminated since the disciplinary proceedings were yet to be conducted when he filed a dispute with the commission. He said, this is contrary to section 110(1) of the Evidence Act, which states, he who alleges must prove.

It was further submitted that section 9 of the Employment and Labour Relations (Code of Good Practice) GN No. 42 of 2007, provides for termination for misconduct for five days absence from duty without

permission. In this dispute it was added that the same was out of work premises without permission for over 20 days.

Lastly, commenting on the reliefs, it was argued that the amount of 12 months compensation was a product of premature process since the applicant was not proved terminated. He also said, the respondent was not entitled to leave pay because he had attained 9 months. Leave in his view is paid upon working for one year. He therefore asked this court to quash and set aside the award.

The respondent's submission was that, Rule 13(1)(2) of the Code of Good Practice, provides that the employer has to notify the employee of his allegation by using forms and in the language that can best be understood. The applicant, it was submitted did not do so before taking a disciplinary action on the employee. It was said, that the applicant used such a bad language to terminate the respondent who was not given a right to be heard which is against article 13(6) of the Constitution. It was further cemented that if the employee did not attend the disciplinary hearing, Rule 13(6) of Code, enjoins the employer to proceed with the hearing. Therefore, it was said, since that was not done, the same did not comply with principles of fair termination. It was the view of the applicant that this

was against section 37 of the ELRA and Rule 9 (1) of the Code (supra). Lastly, the respondent cited the following cases to support his finding;

i. **ST. Joseph Kolping Secondary School vs Alvera Kashushura**
ii. **Managing Director of Kenya Commerce Bank(T) Ltd and Albeto Ondongo vs Shadrack J Ndege,** Civil Appeal No. 232 of 2017, CA
iii. **Mbeya rukwa Auto Parts and Transport Ltd vs Jestina George Mwakyoma** [2003] TLR 251 and
iv. **Halima Hassan Marealle vs Parastatal Sector Reform Commission**, Civil Application No. 84 of 1999.

Having heard the submission of both sides, it is important to note that when unreported cases are cited, copies of the same should be supplied to the court. In the respondent's submission, three unreported cases were cited but not supplied, I will therefore as matter of practice not refer them. I will simply disregard the same. Again, the applicant has cited section 9 of the Employment and Labour Relations (Code of Good Practice), GN No 42 of 2007, apart from miss citing it as a section instead of the rule, still, the same does not provide for termination upon

an employee's abscondment from duty for five days. This provision was therefore cited out of context.

Turning to the merits of the application, based on the nature of this matter, I think, the only issue to determine is if termination was fair. It is trite that for termination of employment to be considered fair, the employer, is cast with the duty of proving so. Section 39 of the ELRA provides so. In this case, it has been submitted by the applicant that the respondent was not terminated. According to the evidence of Dw1, who testified at the Commission, the respondent was permitted for seven days. But he extended the same without leave for more than 20 days. It is unfortunate that he did not tender any document to prove so. Further, he said, he was not terminated but absented himself from employment.

Since it was the duty of the applicant as the employer to prove that the applicant was not terminated and there is no evidence proving so.

It goes without saying therefore that the same has failed to prove that the respondent was not terminated. As well, it is the duty of the employer to keep records of the employee. It is quite pertinent to hold that in the absence of records to prove that the applicant, absented

himself from work, leaves this court with doubt if the applicant's evidence is sufficient to prove her allegation. The employer as I have showed before cast with the duty of keeping records of the employees had not shown, when was he permitted, and when did he come back to the work place. Because he said, the same was not terminated, she ought to have shown the procedure used and if the process of termination had started. What has only been testified is that the respondent was absent from duty for over 20 days.

In party therefore I agree with the commission that the applicant terminated the respondent without due process. Under section 37 of ELRA, termination is fair if grounded on reasons and proper procedure. Otherwise, it is unfair termination as so held.

Lastly the applicant has admitted that the respondent was his employee. It has been further agreed that the same was a security guard and was receiving a monthly salary of 150,000/= per month. The respondent said was being paid 160,000/=. The applicant did not dispute or cross examine him on the same. I take it that he was so being paid. Had there been his salary payment records, it could have been proved otherwise. Since the commission found the respondent was unfairly

terminated, it was proper to invoke section 40 of ELRA to award compensation for 12 months and other rights accruing therefrom.

It is therefore not true of the applicant that what was awarded was not pleaded. In totality, the application has no merit. It is therefore dismissed in its entirety. No order as to costs.

A.K.Rwizile

JUDGE

01.11.2021