

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

REVISION NO. 234 OF 2020

BETWEEN

TANZANIA ELECTRICK SUPPLY COMPANY LIMITED APPLICANT

VERSUS

ESTERDEVOTA TAMBA RESPONDENT

JUDGEMENT

S. M. MAGHIMBI, J

At the Commission for Mediation and Arbitration (CMA) the respondent herein was the respondent. The applicant had lodged a Labour Dispute No. CMA/DSM/TEM/442/2016/128/2017, alleging unfair termination by the applicant claiming for relief of reinstatement. On 03/06/2019 the CMA delivered its award in favour of the respondent awarding her the relief of reinstatement as prayed plus payment of 38 month's salaries for the time that she was unfairly terminated. Dissatisfied with the said decision, the applicant has lodged the current application under the provisions of law under Section 91(1)(a) and (b), 91(2)(b), 94(1)(b)(i) and 94(3)(a)(i) of the Employment and Labour Relation Act, 2004 and Rule 24(1),(2)(a)(b)(c)(d)(e) and (f) rule

24(3)(a)(b)(c) and (d) and Rule 28 (1)(a),(c),(d) and (e) of the Labour Court Rules, 2007 (GN. No. 106 of 2007) on the following grounds: -

- i. That the Arbitrator erred in law and fact when she held that the applicant had no valid reason to terminate the employment contract of the respondent.
- ii. That the Arbitrator erred in law and fact when she held that the termination was unfair as the procedure was not followed.
- iii. That the Arbitrator grossly failed to analyse and evaluate the evidence and testimonies of the applicant's witnesses hence heading to unfair award.
- iv. That the Arbitrator wrongly summoned the applicant's officer one Bruno Tarimo who was not a witness in the proceeding to appear before her and address the issue of the last salary of the respondent while the case was already closed.
- v. That the Arbitrator wrongly awarded the respondent Tshs. 73,404,726.00 based on monthly salary of Tshs. 1,931,677.00 while the last salary of the respondent was 1,391,677.00

The application is filed by notice of application supported by an affidavit sworn by Mr. Thadeo Godfrey Mwabulambo, the applicant's Principal Officer who represented the applicant in this case. On the other

hand, the respondent opposed the application by filing a counter affidavit, she was represented by Mr. George T. Masud, Learned Counsel.

Before venturing into the merits or otherwise of the application, brief background of the application is narrated. The respondent was first employed by the applicant as a Midwife (Nurse) at TANESCO Hale Dispensary. Following her transfer to Dar es salaam, her position was changed to a Cashier where her duties were to receive cash from the applicant's customers and submit the collected cash with its certificate to the accountant ready for banking as indicated in her job description (exhibit TAN1). It is alleged that on 2014 the respondent was charged and found guilty with misappropriation of cash collections worth 717,170.02 due to under submission and gross dishonesty.

After the disciplinary Committee found the respondent guilty of the mentioned misconducts, the applicant terminated her employment contract with effect from 22/04/2015 (exhibit TAN10). Dissatisfied by the termination the respondent unsuccessfully appealed to the applicant's appellate authority. After the appellate authority withheld the decision to terminate her, the respondent became resentful with such decision, she successfully filed a dispute of unfair termination at the CMA. The CMA award included reinstatement to her employment

without loss of remuneration from the date of termination on 23/03/2016 to the date of the award on 03/06/2019. Furthermore, the applicant was ordered to pay the respondent a total of Tshs. 73,403,726 being 38 months salaries loss during the period. Aggrieved by the CMA's award the applicant filed the present application on the aforementioned grounds. The application was disposed by way of written submission, I appreciate the comprehensive submissions which shall be taken on board in due course of constructing this judgment.

I have carefully considered the rival submission of the parties, CMA and court records and relevant law, I find the issues for determination before the Court are as follows; firstly, is whether the applicant had valid reason to terminate the respondent, secondly, whether the applicant followed procedures in terminating the respondent and what reliefs are the parties entitled to.

Starting with the first issue, whether the applicant had valid reason to terminate the respondent, as rightly submitted by Mr. Masud, pursuant to Section 37 of the ELRA, employers are required to terminate employees only for valid and fair reason. Pursuant to Section 39 of the ELRA, it is also the duty of the employer to prove fairness of the termination. In the application, according to the records of the CMA, the

respondent was charged with two misconducts as per the termination letter (exhibit TAN10). In the exact language of the letter it is written:

- i. 'Ubadhilifu wa fedha za shirika na kulisababishia shirika hasara ya upotevu wa fedha jumla ya Tshs. 717,170.02 ndani ya kipindi kuanzia tarehe 07/01/2013 hadi 25/03/2014 fedha ambazo hazikuwasilishwa kwa Mhasibu (under submission)*
- ii. Kukosa uaminifu kwa kiwango kikubwa kwa mwajiri wako'*

The misconducts above can easily be translated as misappropriation of main cash collection worth 717,170.02 that was caused by under-submission and gross dishonesty. The question to be addressed is whether the applicant proved the alleged misconducts. As the record shows the applicant conducted investigation which was done by the internal auditors. The audit report (exhibit TAN 13) revealed instances of under submission of collections amounting to a net submission, hence a loss of Tshs. 717,170.02 which was committed by the respondent. The audit report further reveals that the discrepancies occurred during the period between January 2013 and March 2014 in which there was under submission amounting to Tshs. 2,227,566.02 and over submission of Tshs. 1,510,396.00 causing a net under submission of Tshs. 717,170.02.

It was further revealed that on 17th September, 2013 total collection as per system was Tshs. 10,608,669 collection reported by the

respondent on cash count certificate was Tshs. 10,338,669 therefore there was under submission and banking of Tshs. 270,000. Again, on 23rd September, 2013 there was over submission of Tshs 271,997 followed by under submission of Tshs. 271.997 on 24th September, 2013 as it is reflected at page 2 of the audit report.

In her testimony at the CMA, the respondent strongly disputed the investigation findings but she failed to counter the investigation report on cross examination. For easy of reference, I hereunder quote the respondent's testimony in her own verbatim: -

Qn: Rejea kielelezo ED-5 na TAN 13 (audit report) tarehe 06/11/2014 ulikabidhi shs ngapi?

Ans: Jumla 16,509,458 na kwenye audit report 16,509,458/=

Qn: in tofauti na dispatch yako ya siku hiyo?

Ans: Sioni tofauti

Qn: Siku hiyo ulikusanya shs ngapi?

Ans: 16,509,458/=

Qn: Kuna tofauti?

Ans: Hakuna

Qn: Angalia tarehe 22/01/2014, ulikusanya shs ngapi?

Ans: 12,868,124/= kwenye dispatch, audit report inaonesha 12,868,124. Hazina tofauti

Qn: Kimsingi ripoti yetu haina tofauti na dispatch yako?

Ans: Hamna

Qn: Hakuna ubishi system huwa inasumbua, na inaposumbua tunategemea kiasi kitakachokabidhiwa kuwa kikubwa Zaidi ya kitakachoonekana ni sawa?

Ans: Kwa wakati huo ni sawa

Qn: Angalia tarehe 16/09/2015 kwenye ripoti, kuna tofauti ya laki 2 ambayo hukukabidhi na hivyo ilionekana pungufu laki 2 lakini ilikuwa set – off siku iliyofuata ilipokuwa na ziada. Hapa kulikuwa na tatizo la system. Sasa angalia tarehe 22/01/2013, pungufu ilikuwa ngapi?

Ans: 80,000/=

Qn: Tarehe 14/02/2013, ulikusanya ngapi?

Ans: 23, 037,910/=, mlikabidhi 22,737,...

Qn: Hukukabidhi ngapi?

Ans: 300,000/=

Qn: Tarehe 04/03/2013, tofauti ikiwa ngapi?

Ans: 157,000/=

Therefore, having considered the above testimony where the applicant failed to water down the applicant's evidence. Having proved the first misconduct of misappropriation, it follows that the respondent was dishonesty to her employer hence properly charged with gross dishonesty. Thus, on the basis of the foregoing discussion I am satisfied

that looking at the evidence available in record, the applicant has discharged his duty to prove the case on balance of probabilities that the respondent committed the charged misconducts.

I am not in disregard of the respondent's allegation that her first appointment as a Nurse Midwife was not revoked. Her allegations are contrary with the evidence on record because it is revealed that she permanently started to work as a Cashier in 2007 as evidenced by the Permanent Transfer Letter (exhibit ED4). In my observation the respondent accepted her new terms of the contract and proceeded to sign her job description (exhibit TAN1) accepting the same thus, she was duty bound to comply with her new terms of the contract.

In addition to that, I saw the respondent's letter of 22/09/2006 requesting for change of her position (exhibit ED-1). Her letter was replied by the employer where she was informed that the reason for her transfer was to join her husband in Dar es Salaam and that there is no position of Midwife (Nurse) in Dar es salaam offices. The respondent was further informed that if she wants to go back to her position, she should notify her employer if she was willing to work in other regions apart from Dar es salaam. The record shows that the respondent did not respond to the employer's letter, therefore it is my view that she accepted her new position as a Cashier.

I do not agree with the Arbitrator's view that the applicant should have employed external auditors to conduct the investigation. If we press the need of external auditors all cases, such demand will defeat the purpose of employing internal auditors in the companies/institutions. I am satisfied that in this case, the internal auditors were the proper persons assigned and employed for that particular purpose. At this juncture and for the aforesaid reasons, I am satisfied that the applicant had valid reason to terminate the respondent. The termination was hence substantively fair.

Regarding the procedural fairness of the termination, I agree with Mr. Mwabulambo, Counsel for the applicant that the same were adhered to. Indeed, the applicant complied with the procedures for terminating the respondent on the ground of misconduct as they are provided under Rule 13 of the GN 42/2007. The records show that the respondent was served with the show cause letter (exhibit TAN5) and she responded thereto (exhibit TAN6). Again, the respondent was served with a notice to attend Disciplinary hearing (exhibit TAN6) where she attended and presented her defence as reflected in the Disciplinary Hearing Forms (exhibit TAN7), Disciplinary Hearing Checklist (exhibit TAN8) and Disciplinary Hearing Minutes (exhibit TAN9).

As per the records, the respondent alleged that she was not involved in the investigation process hence challenging the validity of the report. Rule 13 (1) of the Code demands an employer to conduct investigation before he/she charges the accused employee. However, the law did not provide a guideline on how the said investigation should be conducted. In the case at hand, it is proved that the investigation was conducted while the respondent was on suspension.

The applicant's witnesses strongly allege that the respondent was involved in the investigation process though there is no proof of the same. In my view, so long as after investigation the audit report was served to the respondent together with the charge, it is safe to conclude that the investigation process was properly conducted. If the respondent had any evidence to counter the investigation report, she was afforded such right during hearing, therefore she should have brought her evidence at the disciplinary hearing. As discussed above, the respondent admitted that the information in her dispatch book (exhibit ED-5) matched with the audit report, therefore, the allegations that she was not involved in the investigation process lacks merit.

Furthermore, the respondent was properly afforded the right to be heard. As to the issue of mitigation, reading the disciplinary minutes

(exhibit TAN 9) the same is reflected at page three, third paragraph from the bottom.

Turning to the issue of delay of the appeal decision, it is my view that the Arbitrator suo motto raised such issue and the parties were not afforded the right to be heard on such procedural irregularity. Much as I do not see how the same prejudice the respondent's right, I further hold that the Arbitrator's decision without affording the parties' rights to be heard was in violation of the principles of *natura justice*.

On the basis of the above discussion, it is the finding of this court that the applicant complied with the termination procedures as they are provided under Rule 13 of the Code. The termination of the respondent was a proper sanction after considering the fact that the respondent was previously issued a warning as evidenced by exhibit TAN 2 and TAN 3.

I have further noted the applicant's submission raising concern on the CMA's act of summoning the applicant's Officer Mr. Bruno to testify on the respondent's salary. In my view by so doing the Arbitrator did not violate any rule/procedure because the basis of awarding compensation had to be found and since the applicant does not dispute employing Mr. Bruno, or his testimony on the salary, the ground is without basis.

On the last issue on the parties' entitlement, since it is found that the respondent was fairly terminated both substantively and procedurally, she is not entitled to the remedies stipulated under section 40 of ELRA on unfair termination.

However, under the circumstances of this case, it is my view that the respondent is entitled to the remedies provided for under section 44 of ELRA to wit, any remuneration for work done before termination, annual leave if not taken, one month salary in lieu of notice, transport allowance and certificate of service. In the result, the present application has merit. The applicant is ordered to pay the respondent any statutory dues that were due to the applicant at the time of termination. As for the remaining part of the award, it is hereby revised and set aside.

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



S.M. MAGHIMBI
JUDGE



MAHAKAMA KUU YA TANZANIA
(The High Court of Tanzania)
DIVISHENI YA MAHAKAMA YA KAZI
(Labour Division)