IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LABOUR DIVISION)

AT DAR ES SALAAM

REVISION NO. 720 OF 2019

BETWEEN

BATI SERVICE COMPANY LTD. ..... APPLICANT

VERSUS

VICTOR ISRAEL URIO ..... RESPONDENT

JUDGMENT

S.M. MAGHIMBI, J.

The Revision beforehand emanates from the Award of the Commission for Mediation and Arbitration (CMA), Dar es Salaam Zone, (Hon. Kachenje, Arbitrator, in Labour Complaint No. CMA/DSM/KIN/R. 1132/18/17, dated 24th July, 2019 ("the Dispute"). At the CMA, the respondent, Victor Israel Urio was the employee of the applicant Bati Services Company Limited, the employer. The CMA delivered its Award in favor of the Respondent, ruling that the Respondent´s termination was substantially and procedurally unfair, consequently ordering the applicant to pay the respondent a compensation to the tune of TZS 4,800,000/=. The amount included a compensation was for unfair termination, one month's salary in lieu of notice, leave pay and severance

allowances. The CMA also ordered the applicant to provide the respondent with a certificate of service. The applicant was aggrieved by this decision and lodged the current application tabling the following legal issues for determination:

(a) Whether the Arbitrator was right in finding that substantive fairness was not sufficiently proved on the required standards.

(b) Whether the Arbitrator was right in finding that there was procedural unfairness on the Respondent's termination.

(c) Whether the Arbitrator was right in awarding the Respondent payment of severance pay, salary in lieu of notice and annual leave.

The application is supported by an Affidavit of one Theresia Thomas, Principle Officer of the applicant dated 02nd September, 2019. The application was disposed by way of written submissions. Ms. Samah Salah, learned advocate, drew and filed the submissions for the applicant while the respondent's submissions were drawn and filed by the respondent in person.

At the onset of her submissions, Ms. Salah prayed that the affidavit in support of the application be adopted to form part of her submissions. Then in her submissions to support the grounds of revision, Ms. Salah

clustered the submissions in three issues, whether there was proof of substantive fairness on the required standards; two, whether Procedural Unfairness on the Respondent's Termination was proved and three whether the award of severance pay, annual leave and payment of salary in lieu of notice were justified.

On the first issue of substantive fairness, Ms. Salah submitted that Section 37(2) of the Employment and Labour Relation Act, Cap. 366 R.E 2019, ("ELRA") and Rule 9(4) of the Employment and Labour Relations (Code of Good Practice), 2007, ("Code"), considers termination to be fair if it is related to the employee's conduct. That in this case, as correctly stated at page 18 of the Award, deponed in paragraph 10 of the Applicant's Affidavit and evidenced by the termination letter (Exhibit BS-8), the Respondent was terminated for gross insubordination and for demonstrating unacceptable conduct towards the Managing Director and other employees.

That in the CMA Award, the Arbitrator faulted the substantive fairness of the Respondent's termination. That, the Respondent's termination was following his refusal to follow instructions and/or orders given to him by the Applicant's Managing Director in relation to cleaning a site for placing a transformer he transported. At page 20 to 23 of the Award, the Arbitrator

held that the Applicant had no valid reason to terminate the Respondent because no rule had been contravened. The Arbitrator stated that the Respondent was employed as a driver and his duty on the date of incidence was to drive the truck with a transformer, unload the transformer and leave the place. Those other duties like cleaning were supposed to be voluntary. However, the Arbitrator did not refer to any evidence on record to substantiate such finding.

She submitted further that it is an undisputed fact as per the employment contract, (Exhibit BS-1) that the Respondent was to carry out day to day duties as per the job description as well as those which will be assigned by the head of section. That it is further on record, via the testimony of DW1 and DW2 that the Respondent refused to accept instructions of his supervisor in front of his workmates because he claimed that it was not part of his job description. Ms. Salah submitted further that it was confirmed during disciplinary hearing (Exhibit BS-7), that the Respondent refused to take orders/instructions from the Managing Director. She hence argued that the Respondent's conducts towards the Managing Director amounted to serious insubordination and unacceptable behavior which warranted termination of his employment.

Ms. Salah also pointed out that at page 20 and 21 of the Award, the Arbitrator made his own conclusions by stating that among the reasons why the Respondent did not work were because he was employed as a driver and was supposed to work as a driver and any other duties associated with his work as a driver. That the Arbitrator went ahead and made a finding that the Respondent was waiting for the working tools and the act of DW2 and DW3 to work without working tools was the act of cowardice; and he was employed to work in Applicant's company and not in his Managing Director's house, thus refusing to work in the Managing Director's house did not violate any of the rules of the Company, his employment contract or any labour laws. She argued that the Arbitrator's findings were based on his own sentiments, opinion and extraneous factors not arising out of evidence on record. That it is on record, particularly the testimony of DW1, DW2 and DW3 which was corroborated by the testimony of the Respondent himself that the Respondent refused to follow the Managing Director's instructions to clean the site. It is also evident that his fellow employees participated in the cleaning to comply with the Managing Director's instructions, although cleaning was not among their duties. That all instructions were given in the course of the Respondent's employment as a driver therefore, the Arbitrator erred in law and fact in giving such findings not based on evidence on record.

She supported her submissions by referring the court to its decision in **Labour Revision No.428 of 2016, between Statoil Tanzania as Elise Gruner Vs. Victoria Jonathan**, at page 10 where it was held;

> *"the Arbitrator was not supposed to determine the matter before her basing on her experience. It is obvious that the arbitrator did import to the case before her prejudicial factors which were not in evidence. That was an error which prejudiced the parties and lead to miscarriage of justice. Justice should not only be done but it should also be seen to be done. The arbitral award has to be based on the evidence presented before the CMA and not otherwise. The arbitrator's conduct gave rise to a reasonable perception of double standard i.e. biasness. The arbitrator was not supposed to step into the shoe of a party and give her own experience. The arbitrator was supposed to act in a fair manner to both parties before her"*

She then submitted that from the above decision, it was clearly held that the Arbitrator's award must be based on evidence presented before the CMA and not otherwise. Her conclusion was that the Arbitrator's findings were not based on evidence presented.

She further submitted that the evidence on record established that the Respondent committed an offence of insubordination, supporting this

submission by citing the case of **Yohana Karanja Versus Mbeya City Council, Revision No .10 of 2014** at page 110, which cited with approval the case of supreme Court of Appeal of South Africa in **National Union of Public Service 7 Allied Worker's Union (NUPSAWA) Obo Mani and 9 others Versus national Loitteries Board, Labour Case No. 576 of 201**2, which defined the offence of insubordination to mean:

> *"Unfair labour practices occurring when an employee refuses to accept the authority of his or her employer or of a person in a position of authority over an employee"*

Comparing the decision to our case at hand, she submitted that the Respondent refused to follow/accept the instructions and/or authority given to him by the Applicant's Managing Director, who had authority over him, in relation to cleaning a site for placing a transformer which he transported, thus, the same amounted to insubordination. That the essentials for an offence of the insubordination to include refusal or intentional failure to obey reasonable and fair instructions; the instruction must not infringe the rule of the employer or laws of the country; and such instruction must involve tasks that truly need to be done.

She went on submitting that in this case, it is evident that the instructions given by the Applicant's Managing Director were reasonable, as

they related to cleaning a site for placing a transformer which the Respondent transported and as testified by DW1, DW2 and DW3, they were not aimed to be carried out by the Respondent alone but with other employees. Further that it is clear the instructions given did not infringe any rule of the employer or the country and involved the task which needed to be done. As such, she concluded that the Respondent committed an offence of insubordination and in terms of Section 39 of ELRA and Rule 9(3) of the Code, the standard of proof of the fairness of termination is balance of probabilities. That based on evidence on record, the Applicant proved that the Respondent committed serious insubordination towards the Managing Director on balance of probabilities hence the reasons for the Respondent's termination were not valid.

On my part, I find that the issue of substantive fairness of the termination is broader and as required in the labor regime, the yard stick is fairness. Indeed the cited laws refer to fairness of termination and as correctly pointed out, the applicant did refuse to obey an order of the superior officers. However, the question which is the crux of the matter is whether such a refusal or what she termed as insubordination was sufficient to warrant termination of the respondent? It should be borne in mind that in cases of termination of employment, one of the issues to be determined by

the court is usually whether the reason for termination was substantively fair.

By substantive fairness, the court is called to analyse whether the punishment of termination imposed to the employee is warranted by the conduct that is alleged to be inappropriate. In ideal cases of good practice, employers are supposed to reduce the burden of the court in such determination by providing their workplace Code of Good Practice or their Human Resource Manuals. These are elaborative documents which define conducts which are said to be inappropriate and the respective punishment/disciplinary measures against those practiced. As for the case at hand, the applicant refused to clean the place, in order to conclude that the insubordination was such serious to warrant termination, the question would first be was this his primary line of duty? The applicant does not dispute that the respondent was hired as a driver hence cleaning a place is not even an incidental duty to driving, let us say it falls under the category of *"any other duty that may be assigned to him".*

Indeed as per the evidence adduced, the place belonged to his employer but would he be forced to perform a duty that was not his? Was such a refusal severe enough to warrant a termination? Was the offence scheduled in any Human Resource Manual or code of conduct that it

warrants to a termination? I have posed this questions in the context that not every misconduct of an employee warrants his/her termination. Therefore unless the same is in any written form, the issue to be determined is whether termination was a fair punishment for the wrongdoer. Rule 12(2) of the Code provides:

> *"**First offence of an employee shall not justify termination** unless it is **proved** that the **misconduct is so serious** that it makes a continued employment relationship intolerable"*

Section 12(3)(f) of the Code define acts which may justify insubordination to include gross insubordination. The applicant was required to prove that the insubordination was gross to warrant the termination, however in this case, the respondent was asked to perform a duty that was not in his line and outside the office. At this point, it is clear that the respondent could have gotten off with a warning or a lighter punishment than termination of employment because the applicant failed to prove that the insurbodination was gross. In the absence of any written code that such a refusal to perform a task that is incidental to what the respondent was hired to do warrant a termination, then the termination would be nothing but unfair, given the gravity of the disciplinary measure imposed. This ground hence lacks merits and it is hereby dismissed.

The second ground is on Procedural Unfairness on the Respondent's Termination. As correctly pointed out by the respondent and the CMA, the respondent was not fairly terminated procedurally as well. Looking at Exhibit VU-10, it is a hearing form which at no point informed the applicant to bring any representative. The Charge Sheet exhibit VU-09 and 10 had three offences which were more or less the same thing. The procedures for termination as provided under the Code include investigation, disciplinary hearing, preceded by a notice of disciplinary hearing which explains the charges against the employee and his rights thereof, and the written notification of the decision.

As correctly pointed out by the arbitrator, the Respondent's termination was procedurally unfair on the part of investigation and Respondent's right to representation during the disciplinary hearing. According to Exhibit BS-2 (Suspension Letter) the Respondent was suspended pending investigation, but no investigation report or contents thereto was availed to the CMA or the Respondent or the during the hearing proceedings. This was in contravention of Rule 13(1) of the Code.

On her part, Ms. Salah argued that Rule 13(1) requires the employer to conduct investigation, prior to disciplinary hearing to ascertain whether there are grounds for a disciplinary hearing to be held. However, the law is silent

on the manner in which such investigations should be conducted and that the said rule does not provide for a requirement that an investigation report must be prepared at the end of the investigation or rather investigation conducted must be proved by a written report. That the employer is only required under the law, to prove on a balance of probabilities that investigations were conducted. I partially agree with her that the investigation report need not be in a written form, however, the respondent should have been given a head start on what were the findings that he should get prepared to defend. In the absence of that, fairness may not be the correct word to be used in the circumstances.

There is also another irregularity; according to Rule 13(3) of the Code, he is entitled to representation. In the case at hand, the respondent was denied his right to have the representative of his own choice. There is unshaken evidence that his advocate was denied access to the meeting and that PW2, the alleged respondent's representative at the disciplinary hearing was not a choice of the respondent's, rather he was asked by the applicant/employer to represent the respondent. This is in contravention of the Code of Good Practice. From the above two findings, it is safe to conclude that the applicant was unfairly terminated procedurally.

The last issue which the applicant tabled for determination is whether the Arbitrator was right in awarding the Respondent payment of severance pay, salary in lieu of notice and annual leave. Ms. Salah's argument was that under section 42(3)(a) of the ELRA, severance pay is not payable when termination was due to misconduct. That based on their foregoing submission, the Respondent was fairly terminated for misconduct, therefore, severance pay is not payable, and the Arbitrator erred in law in awarding the same. On my part, having found that the termination of the respondent was unfair both substantively and procedurally, under Section 42(2)(a)(b) the employer is required to pay severance allowance to the employee who has worked for more than 12 months continuous service and has been terminated. In the current dispute, the respondent qualified for both conditions hence the payment of severance pay was justified.

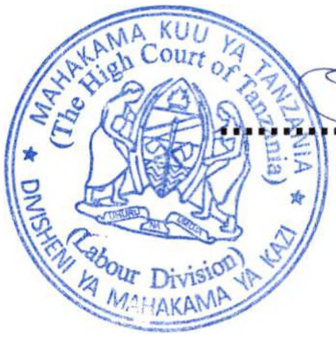
As for the payment of annual leave, her submission was that the Arbitrator awarded annual leave pay on the basis that there was no evidence to prove that upon termination, the Respondent took his annual leave or was paid his annual leave. She argued that it was evident as indicated in Exhibit BS-8, that upon termination, the Respondent was paid a total of Tshs. 154,695 to compensate for outstanding annual leave and the Arbitrator did not state any reason for disregarding this evidence. At this point I agree with Salah

that the respondent was paid for his outstanding leave as indicated under Exhibit BS-8 therefore the award of annual leave was improper hence set aside. This amount shall be deducted from the total amount that the respondent was awarded by the tribunal.

Then there is salary in lieu of notice, Ms. Salah argued that the burden of proof lied to the Respondent who failed to prove that he was entitled to payment in lieu of notice. Further that in terms of Section 41(7)(b) of ELRA, an employer may terminate employment contracts without notice for any cause recognized by law. She argued that misconduct is a cause recognized by ELRA to be valid and fair reason for termination hence, the Applicant was entitled to terminate the Respondent without issuing notice. Having made the above findings, since there was no notice of termination of employment given and considering the circumstances that the respondent was terminated which have been declared to be unfair, the payment of salary in lieu of notice was justified. Annual leave is the right of the employee under Section 31 of the ELRA. Since the applicant did not deny that entitlement to the employee, upon termination, Section 41(1)(b) requires the employer to pay the employee any annual leave pay due to an employee under section 31 for leave that the employee has not taken, the arbitrator was therefore right to award the compensation.

In conclusion, save for the payment of annual leave which was set aside, I see no reason to interfere with the findings of the CMA; this Revision is allowed to that extent only, the remaining grounds of revision are hereby dismissed.

Dated at Dar-es-salaam this 29th day of September, 2021



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S.M. MAGHIMBI
JUDGE