

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

REVISION NO. 124 OF 2020

SHEKILANGO SERVICES STATION TOTAL.....APPLICANT

AND

OMBENI MUSHI..... RESPONDENT

JUDGMENT

27th July & 24th September 2021

Rwizile, J.

The applicant filed this application protesting the decision of the Commission for Mediation and Arbitration (CMA) in labour dispute No. CMA/DSM/KIN/R.600/2018. She 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 Dar es Salaam in Labour Dispute No. CMA/DSM/KIN/R.600/2018 and set aside the Award of the Commission for Mediation and Arbitration delivered by Hon. Nyagaya,P on 28th February, 2020.

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

The application is supported by the affidavit of Leah Robert Mwage applicant's Principal Officer. Paragraph 4 of the affidavit contains two legal issues to be determined by this court, as follows;

- i. Whether it was correct for this Honorable Arbitrator to disregard sufficient grounds for termination.*
- ii. Whether it was correct for the Honorable Arbitrator to order the applicant to pay the respondent the sum of Tsh. 310000/= when he had already received the sum of Tsh. 408,100/=*

Facts leading to this application can briefly be stated that, the applicant was employed by the respondent as a pump attendant for a contract of one year. It started on 1st May 2016 and ended on 1st May 2017. However, his time of employment was extended. Upon extension, he was terminated for the reason of stealing. He filed a complaint before the Commission, claiming for unfair termination and demanded costs for termination. He was successfully awarded, terminal benefits to wit, 310,000/= as unpaid salary. Dissatisfied with the decision, the respondent preferred this application.

The applicant was represented by Mr. Simkoko, Personal Representative, whereas the respondent appeared in person. The application was orally argued. For the applicant, it was argued, in respect of the first ground that there was evidence showing the respondent did steal fuel upon reviewing evidence of the CCTV camera. He submitted that evidence was tendered and the respondent admitted by his letter to have committed the misconduct. But to his dismay, the arbitrator did not accept their evidence as credible without any good cause.

On the second ground Mr. Simkoko submitted that the CMA erred in law in awarding respondent the sum of 310,000/= while at the time of termination he was paid 408,100/=. He was of the view that the arbitrator ought to consider the same.

He stated further that the process of termination was followed and there was a valid reason for termination. He thus prayed for the award to be quashed.

Opposing the application, the respondent submitted that there is no proof that the amount of 408,100/= was paid, he thus prayed to be paid his terminal dues as per the law which includes compensation. In rejoinder, Mr. Simkoko emphasized that the respondent was not

employed in a permanent contract but it was a fixed term contract and it was renewable on every year.

Having considered the relevant submissions and the records, this court finds it worth to start determining issues as raised. The first one being *whether termination of the respondent was grounded on reasons*. It has been submitted that the applicant terminated the respondent due to stealing. Stealing at the work place, if proved, constitutes a gross misconduct that deserves termination. But for the same to be done, there are procedures that must be followed. The validity and fairness of termination is well stipulated under section 37(2) of the Employment and Labour Relation Act, No.6 of 2004 which state that; -

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.*

This is in line with Article 4 of the ILO Convention No. 158 of 1982 which provides that:

The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on operational requirements of the undertaking establishment or service."

The Convention therefore serves to lay out standards of procedural fairness in cases of termination of employment and thus includes, amongst its terms, provisions relating to the procedure to be applied prior to or at the time of termination, the procedure of appeal against termination, and a worker's entitlements upon termination, as per articles 5, 7 and 8. It further provides that the duty to prove that termination was grounded on reason and therefore fair, is cast on the employer as per article 9, which has similar wording as section 39 of ELRA. The same has to do so on a balance of probability.

It is on record that the applicant was accused of fuel stealing. He is alleged to have used a card with registration number 39094. He did so,

it was alleged, after selling fuel to the customer who had in possession of the card and had a password in such connection and hence did the same transaction. It is undisputed that all transactions handled by the respondent on 19.12.2017, using the same card but no loss was recorded.

I am of the view that there is no evidence to prove, that the respondent was involved in stealing.

Exhibits, like D-1 which is a list of transactions done on the days and D-2, the respondent's statement regarding the card does not connect the respondent with the alleged misconduct. This piece of evidence is supporting his defense, that the transactions were effected by using client's card issued at filling station.

Therefore, the applicant's allegation that the respondent admitted the offence lacks legal stance. For the foregoing reason, I am of the view that there was no valid reason for termination. This defeats section 37(2) of the Employment and Labour Relation Act.

For termination to be procedurally fair on grounds of misconduct, the employer/applicant herein has to adhere to the procedures laid down under Rule 13 of the Employment and Labour Relation Act (Code of

Good Practice) GN 42 of 2007. The law provides for a mandatory requirement of conducting an investigation to ascertain grounds for a hearing to be considered.

Investigation was not carried out to justify how the applicant conspired or was involved in the alleged misconduct. This was so important to ascertain whether there were grounds for a hearing or not. In the events of not complying with the fundamental procedure, as stipulated under Rule 13(1) of the code of good practice, I hold there was no fair termination in terms of procedure. 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."

Therefore, I find no need to fault arbitrator's findings on these two aspects.

Regarding the reliefs to the parties, since the relationship between the parties turned sour since 19.12.2017 while the contract was supposed to end on 01.05.2018, and since there was no evidence proving how payment was made to the respondent, this is contrary to section 15(1) (h) of the Employment and Labour Relation Act. This is because it is the duty of the applicant to keep record for remuneration, which she has failed to prove.

In the circumstance, this court awards the respondent six months salaries (06) as a remaining period. The principle of awarding the remaining period has been applied in different cases of the nature of a fixed term contract such as the case of **Good Samaritan v 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

In the result I find no reason to fault the Arbitrator's finding that the applicant had no reason to terminate him. The same did not fairly as well follow the procedure in terminating respondent's employment. Therefore, this application is devoid of merits and I hereby dismiss it. Each party to bear its own costs.



A.K.Rwizile

JUDGE

24.09.2021