

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

REVISION NO. 733 OF 2018

BETWEEN

ORCA DECO LTD

APPLICANT

AND

ALLY MUSSA YUSUPH.....

RESPONDENT

JUDGMENT

Date of Last Order: 23/02/2021

Date of Judgment: 30/04/2021

A. E. MWIPOPO, J.

The Applicant here in namely Orca Deco Ltd has filed the present application against the decision of the Commission for Mediation and Arbitration (CMA) in labour dispute no. CMA/DSM/TEM/246/2016. The Applicant herein is praying for the orders of the Court in the following terms:-

1. That this Court be pleased to revise and set aside the award of the Commission for Mediation and Arbitration at Dar Es Salaam in labour dispute no. CMA/DSM/TEM/246/2016 delivered by Hon. M. Batenga, Arbitrator, on 14th September, 2018.

2. Any other relief this Court deems fit and proper to grant.

The Application is supported by the Applicant's Affidavit sworn by William Charles, Applicant's Human Resources Manager. Paragraph 8 of the Affidavit contains two legal issues arising from material facts. The respective legal issues are as follows;-

- i. That, the trial Arbitrator erred in law by delivering an award against the Applicant.
- ii. That, the trial Arbitrator erred in law by failure to properly analyse the evidence given before her hence reach improper conclusion.

The background of the dispute in brief is that; the Respondent namely Ally Mussa Yusuph was employed by the Applicant for one year oral employment contract in 2012. The Contract was renewed upon expiry and the last employment contract was renewed orally in the year 2016. The Respondent was terminated from employment for misconduct on 17th May, 2016. The Respondent was not happy with the termination and he referred the dispute to the Commission which decided the dispute in their favour. This time the Applicant was not satisfied with the Commission award and he filed the present application for revision.

Both parties to the application were represented. The Applicant was represented by Mr. Ashery K. Stanley, Advocate, whereas the Respondent was represented by Mr. Edward Simkoko, Personal Representative from TASIWU. The Court ordered for the hearing of the matter to proceed by way of written submissions following the parties' prayer.

The Applicant's Counsel submitted in regards to the first legal issue that submitted that the Respondent filed the Complaints in the Commission through CMA Form No. 1 against Manager, Orca Deco Ltd. It was the CMA Form. No. 5 which shows that Mediator substituted the name of the Respondent from Manager Orca Deco Ltd. The Applicant raised preliminary objection on the matter but the Arbitrator overruled it on reason that he is dealing with the matter brought by the Mediator through CMA Form No. 5. The Counsel is of the view that the act of the Mediator to substitute the name of the Applicant without assigning the reason is material irregularity. The Court are obliged to abide to the pleadings filed by the parties. To support the position he cited the case of **Temeke Municipal Director vs. Nixon Njolla and Another, Revision No. 564 of 2019, High Court Labour Revision, at Dar Es Salaam, (Unreported)**.

In regards to the second legal issue the Counsel submitted that the evidence available in record was sufficient to prove that the Respondent committed both offences of sleeping at work and kicking his director. The trial Arbitrator erred to hold at page 7 of the Commission award that there was no sufficient evidence to prove the second offence of kicking his director against the Respondent. He was of the opinion that the evidence of DW1 and DW2 proved that the Respondent kicked his director (DW1). This evidence proved the offence in balance of probabilities. He prayed for Court to allow the application and revise Commission award.

In reply, the Respondents' Personal Representative submitted that the first issue that the Respondent sued the wrong party have already been determined Commission. Rule 25(3) of the Employment and Labour Relations (Code of Good Practice) Rules, G.N. No. 64 of 2007 provides tha the Commission may correct the error on its own accord after giving notice to all parties. The Commission is authorized by law to correct error of defects. Thus, the Applicant is estopped from challenging the same under section 9 of the Civil Procedure Code Act, Cap. 33, R.E. 2002. The case of Temeke Municipal Director vs. Nixon Njolla

and Another, (Supra) cited by the Applicant is irrelevant in this matter as the issue of suing the wrong party was not determined at the Commission until during revision at High Court. But, in the present matter the issue of suing a wrong party was determined at Commission.

The Respondent's Representative submitted regarding the Applicant's second legal issue that there is no witness who testified that they saw the Respondent kicking DW1. DW2 testified that he received information from Mikidadi who alleged that he saw the incidence but the said Mikidadi was not called as witness. This hearsay evidence is no reliable. Also, the Applicant failed to conduct investigation to ascertain whether there are grounds for hearing to be held which is contrary to rule 13(1) of G.N. No. 42 of 2007. DW3 testified that they did not conduct investigation due to the reason that an incident was very clear. Thus, the Applicant failed to prove fairness of termination in terms of procedural and substantive issues which rendered the termination to be unfair. The Representative prayed for the Court to dismiss the application for lack of merits.

In rejoinder, the Applicant's Counsel submitted that rule 25(3) of G.N. 42 of 2007 provides about correction of errors

during proceedings and not pleadings. The law direct any person with mandate to exercise discretionary power in Court to act judiciously. He cited the case of **Reginald Abraham Mengi vs. Muganyizi J. Lutagwaba, Consolidate Commercial Case No. 214 of 2016, High Court Commercial Division, at Dar Es Salaam, (Unreported)**. The Commission acted in its own accord and parties were not notified of the changes of parties. The principle of estoppel stated by the Respondent is not applicable as it is the issue of law and not the issue of facts. Thereafter, the Counsel retaliated his submission in chief.

From the submissions, it is clear that the issue in dispute is regarding the act of the Mediator to change the name of the parties in the CMA Form No. 1 and if there is sufficient evidence to prove the fairness of termination. Thus, the issue for determination are as follows:-

1. Whether the Mediator properly changed the name of the Applicant in the dispute before the Commission.
2. Whether there is sufficient evidence to prove that the termination of respondent employment was fair.

In determination of the first issue the Applicant averred that the Arbitrator erred to overrule their preliminary objection that

the Respondent sued the wrong party on the reason that the CMA Form No. 5 which refers the dispute for arbitration while the Mediator has no such powers. The Respondent opposed the Applicant's submission on ground that the Mediator have power under rule 25 (3) of G.N. No. 64 of 2007 to correct errors and that the Applicant is estopped from challenging the finding of the Commission.

As submitted by both sides the CMA Form No. 1 shows that the disputed before the Commission was instituted against Manager Orca Deco Ltd as the employer. The Mediator's certificate of non-settlement - CMA Form No. 5 shows that the Respondent's name is Orca Deco Ltd. The Applicant raised P.O. which was heard on 12th April, 2017. The Respondent submission as found in page 21 of typed proceedings shows that from the beginning both parties agreed that Orca Deco Ltd was the Respondent (employer) before the Commission. This averment by the Respondent was never disputed by the Applicant. The Respondent was of the opinion that the Applicant is estopped from challenging this facts. Since the matter is before the Court for revision parties are at liberty to submit on matters of law and

facts as the Court is availed with jurisdiction to determine them. Thus, the Applicant is not estopped from submitting on the issue.

Rule 25(3) of the Labour Institutions (Mediation and Arbitration) Rules, G.N. No. 64 of 2007 provides for the discretion of the Commission to correct the errors or defects on its own accord, after giving notice to all parties concerned. Rule 25 of G.N. No. 64 of 2007 provides in general for the power of the Commission to correct names of the party in any proceedings incorrectly or defectively cited. Thus, the Applicant's submission that the Commission has no power to correct names of the parties in the CMA Form No. 1 has no basis.

The Respondent submitted before the Commission when the Applicant raised P.O. that both parties agreed that the dispute before the Commission was between the Respondent and the Orca Deco Ltd. This allegation by the Respondent was never been disputed by the Applicant in his rejoinder. This means that what was stated by the Respondent is the truth that they agreed that the dispute before the Commission was between the Respondent and Orca Deco Ltd. For that reason, I find that the Mediator rightly filed CMA Form. No. 5 to show that the dispute was between the Respondent and Orca Deco Ltd. The Arbitrator rightly ruled that

the dispute before him was between the Respondent and Orca Deco as shown in the CMA Form No. 5. Thus, the answer to the first issue is positive that the Mediator used his discretion properly to change the name of the party from Manager, Orca Deco Ltd to Orca Deco Ltd.

The Applicant's Counsel submitted that the evidence from DW1 and DW2 proved on balance of probabilities that the termination of Respondent was fair substantively and procedurally. The Respondent submitted that the Applicant failed to prove the second disciplinary offence that the Respondent kicked his director and the Applicant did not conduct investigation on the matter as it is required by rule 13(1) of G.N. No. 42 of 2007.

It is a well-established principle of law that once there is issue of unfair termination the duty to prove the reason for termination was valid and fair lies to employer and not otherwise (See. **Association of Tanzania Tobacco Traders v. Ahmed Ally Ahmed**, Revision No. 11 of 2012, High Court of Tanzania, Labour Division at Tabora). In the case of **Tanzania Revenue Authority V. Andrew Mapunda**, Labour Rev. No. 104 of 2014, High Court Labour Division at Dar es salaam, (unreported), 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 reason and fair procedure. In other words, there

must be substantive fairness and procedural fairness of termination of employment, Section 37(2) of the Act.

(ii) 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.”

In the matter at hand, the Applicant was charged for two disciplinary offences before the Disciplinary Committee. The first offence is to attack the Director and the second offence is to sleep during work. The Respondent did not dispute the second offence and admitted that he slumbered (half sleep) during working hours as he was not feeling well. Concerning the first offence, the Applicant relied in the evidence of DW1 who testified that he was kicked by the Respondent. The testimony by DW1 was not supported by any other witness as DW2 testified that he was not present during the incident and that he was told by one Mikidadi that the Respondent kicked DW1. The evidence by DW2 is hearsay hence it cannot corroborate the testimony of DW1. The testimony by DW1 was challenged by the Respondent during cross examination and on his testimony hence it needs another independent evidence to support it. That independent evidence is lacking. The said Mikidadi was never called during disciplinary hearing or before the Commission to testify. Thus, I agree with

the Arbitrator that the Applicant failed to prove the reason for termination for the offence of attacking (kicking) the Director against the Respondent. This is the offence which is serious misconduct that may justify termination as per rule 12(3) (e) of G.N. No. 42 of 2007. The disciplinary offence of sleeping during work hour which the Respondent admitted does not justify termination to the first offender employee.

Further, it is in record that the Applicant did not conduct investigation of the matter as it was required by rule 13(1) of G.N. No. 42 of 2007. The reason by DW3 that the evidence was obvious has no basis and the law was supposed to be followed. Failure to conduct the investigation and avail the employee with the investigation report is denying the respective employee with his right to defend himself from the allegations (see. **Severo Mutegeki and Another vs. Mamlaka ya Maji Safi na Usafi wa Mazingira Mjini Dodoma (DUWASA), Civil Appeal No. 343 of 2019, Court of Appeal of Tanzania at Dodoma**). For that reason the procedure for termination was not fair as it was held by the Commission. For that reason, I find the termination to be unfair substantively and procedurally.

Therefore, the revision application is devoid of merits and I hereby dismiss it. The Commission for Mediation and Arbitration Award is upheld. Each party to the suit to take care of their own cost.

A. E. MWIPOPO
JUDGE
30/04/2021