IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 275 OF 2020

K.K. SECURITY ..... APPLICANT

VERSUS

JOSHUA CHILOLET ..... RESPONDENT

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

(**William**: Arbitrator)

dated 30th March, 2020

in

REF: No. CMA/DSM/KIN/R.737/17/741

JUDGEMENT

01st & 25th March 2022

Rwizile J

This application is for revision. It is emanating from the decision of the Commission for Mediation and Arbitration (CMA). It was filed by the applicant by the chamber summons with an affidavit stating reasons for which the same is based.

Materially, the respondent was employed as a security guard by the applicant on 5th November 2011. Later, on 1st January 2013 was

promoted to the position of Dog Master. However, the relationship between the parties went bad.

As a result, on 2nd June 2017, the respondent was terminated on account of gross negligence, following death of two dogs due negligent training. Considering his termination unfair, the respondent unsuccessfully appealed to the country human resource manager of the applicant. Following, dismissal of his referral, an application was filed with the CMA. The respondent successfully proved unfair termination. The CMA ordered the respondent to pay him, the sum of TZS 9,170,549.00 as compensation for unfair termination. The applicant was aggrieved, hence this application, seeking for revision of the award. Grounds for revision by the applicant are as hereunder: -

i. That, the Hon. Arbitrator erred in law and fact for deciding to close applicant's case without reasonable justification and conducted Respondent's case in absence of the applicant hence occasioned injustice to the applicant.

ii. That, the Hon. Arbitrator erred in law and fact in holding that the respondent's termination was substantively unfair while the applicant had valid reason for termination.

iii. That, the Hon. Arbitrator erred in law and in fact by holding that the applicant did not follow procedures in terminating the respondent while applicant adhered to all procedures relating to gross negligence.

iv. That, the trial Arbitrator erred in law and in fact in awarding 12 months' salaries for unfair termination without justification for so holding.

The application is supported by the affidavit of Daniel Mwakajila, applicant's human resources manager.

Opposing the application, the counter-affidavit of the respondent was filed. When the application came for hearing, Mr. Elipidius Mukotani Philemon learned Advocate appeared for the applicant while Mr. Yona Lucian Habiye, learned Advocate appeared for the respondent.

Mr. Elipidius raised an additional issue and argued the same first. It is coached as follows; *whether the CMA had jurisdiction to entertain the dispute preferred under the repealed forms.*

Submitting on this point, the learned counsel stated that the award was improperly procured because forms used by the respondent were repealed. He argued that section 86 of the Employment and Labour Relations Act (ELRA) so provides. It is intrusive, he went on submitting,

that the forms applicable are made under the regulations. To support his argument, he referred this court to the cases of **Fanuel Mantri N'gunda vs Herman Msantiri and 2 others** (1995) TLR 155, CA and asked this court to set aside the award.

On the second ground, Mr. Elpidius submitted that termination was due to negligence. The respondent was an expert in dog training as shown at page 8 of the award. The learned counsel added, that dogs suffered stress and due to bad weather, long training and they died therefore due to the respondent's negligence. Further, it was submitted that the evidence of Pw1 shows, dogs died out of stroke and that the respondent was responsible.

The learned counsel insisted that the respondent was an instructor in the training department and admitted that dogs died because of heart stroke. For the foregoing, the learned counsel held the view, that termination of the respondent was grounded on valid reasons. He asked, this court to set aside the award.

The succeeding two issues, three and four were argued together. The same are on procedure. It was argued for the respondent that even though the notice for disciplinary hearing was given on the day of the hearing. The same did not affect the trial as per the strength of evidence

he gave. In conclusion, the learned counsel was of the view that all procedures were followed and prayed for the award to be set aside.

Submitting in opposition, Mr. Yona learned counsel argued that, section 86(1) of ELRA deals with forms. He stated as well that the Regulation governing the forms is 34(1) of G.N. No. 47 of 2007. He went on saying, that CMAF.1 had an error which did not occasion failure of justice. He asked this court to take pleasure in the Overriding Objective Principal rule applicable here. The learned counsel argued that, Rule 31 of G.N. No. 64 of 2007 provides for condonation in order to deal with matters expeditiously.

Submitting on the third issue, he argued that death of the dogs, was caused by negligence of those who handled them. It was due to those who instructed them, the learned counsel added. Further, he submitted that, termination has to follow the procedure provided for under Rule 13(3) of the Employment and Labour Relations (Code of Good Practice) Rules G.N. No. 42 of 2007. The law therefore, he added sets outs 48 hrs for disciplinary hearing as it has been shown at page 7 of the award.

He said, the respondent, was called in hearing and dismissed on the same day.

Dealing with the last issue, he had this to submit. That compensation was proper as there were no reasons for termination and procedures were not followed. He therefore prayed for this application to be dismissed.

In rejoinder, Mr. Elipidius submitted that, the enabling provision is not section 86(3). There are Regulations and CMAF1 is made under same Regulation. That CMA F1 was not proper and so jurisdiction is in question. The learned counsel held the view that the Overriding Objective principal cannot apply. That, the dogs were mishandled by the training department and so died. The respondent was the head and had knowledge of the same issue of weather. Lastly, he argued, the respondent was given time but did not prove how he failed to get prepared.

Having heard both submissions and ground raised, apart from the new framed up issue, the three remaining ones can be coached in the following form;

Whether the respondent's termination was fair in terms of valid reasons and procedure and *to whether, the reliefs awarded were proper.*

Before delving into the substantive issues as raised, I have to first deal with the first issue of jurisdiction. The applicant's counsel argued that the forms used to initiate the claims are pegged in the repealed law. True indeed, that a perusal on the CMAF1, that commenced the claims is made

under section 86 of ELRA, as rightly submitted by Mr. Elpidius. The current form is no longer under the same provision. It is now made under Regulation 34(1) of Employment and Labour Relations (General Regulations) GN No. 47 of 2007. This court was asked to nullify the award because the claims as submitted were founded in the improper forms. I have ventured to see and compare the forms. It is clear that what has been amended is just an enabling provision. Instead of section 86 of ELRA, it is now named under regulation 34(1) of GN No. 47 of 2007. The form and content remained the same. In my considered view, this may have the effective of nullifying the award based on the forms, if the two forms were different in form and in substance upon being repealed. With respect to Mr. Elpidius, the old and new forms are both in letter, form and content the same. Therefore, it would be purely absurd to act in the manner he asked this court to do. Apart from that, it is as clear as crystal that in labour matters, courts should aim at reaching substantive justice. Indeed, substantive justice covers more of equity than law. I therefore hold that the first issue has no merit. It is dismissed.

On dealing with the second, this court is enjoined to start with what are the dictates of the law. Section 37(2) of the ELRA requires an employer to prove that termination was substantively and procedurally fair. It reads:

"A termination of employment by an employer is unfair if the employer fails to prove-

(a) that the reason for the 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."

From the above provision, the burden of proof is placed upon the employer to prove if there was valid and fair reason to terminate the employee. Further, the process in terminating such an employee should fully observe the law. Going by the records of the CMA, it has been observed that the respondent was terminated on the ground of negligence for not taking care of dogs during the training, a thing that caused death. In trying to prove that there was valid and fair reason, the applicant called the Administrative Assistant -Dw1. He testified that the respondent was the dog trainer. He said, on 27th December 2016 two dogs while on training, died. He stated, it was due to negligence. He said the respondent

was supposed to be with them during the training but didn't. He was also, supposed to inform the management but didn't. Based on evidence, Dw1 during cross examination had this to say: - (proceeding not typed)

"Q. Ni kitu gani/assessment mliyoifanya wewe kama administrative assistant kuthibitisha kuwa mbwa walikufa kwa uzembe?

A. Kama nilipoeleza awali kuna taratibu zilizotakiwa kufanyika wakati wa kuwafanyisha mbwa mazoezi lakini hazikufanyika.

Q. Mahakama itaaminije kuwa kuna hizo taratibu, je umekuja na hizo taratibu kuithibitishia tume?

A. Kuna mtu ambaye atakuja kutoa ushahidi wa hilo hivyo ataelezea vizuri kuhusu hizo taratibu

Q. Kwahiyo kwa leo haujaja na utaratibu huo hapa mbele ya mahakama

A. Ndio."

Given the evidence, it can be concluded that negligence on part of the respondent was not proved since there was no witness who so testified. There is no doubt that the dogs were taken for a post mortem examination as the report shows. The possible cause of death, it stated, was heart stress caused by exposure to high temperatures and humidity. There is

no proof that on the fateful date dogs were so exposed, leave aside being exposed by the respondent. The only evidence in this respect was by Dw1 during cross examination, he said: -

> *"Q. Umesema tarehe 27/12/2016 kuna tukio la mbwa kupoteza maisha kwa bahati mbaya, ulikuwa wapi, je wakati mbwa hao wakipoteza Maisha kwa bahati mbaya?*
>
> *A. Nilikuwa ofisini*
>
> *Q. Ulipataje taarifa kuwa mbwa wamekufa kwa bahati mbaya*
>
> *A. Walikufa kwa uzembe sio bahati mbaya, nilipata taarifa kwa email iliyotumwa ikieleza uzembe uliofanyika na mbwa wawili kufa"*

It is from this evidence that this court is satisfied that in terms of section 37(2)(b)(i) and (ii) of the ELRA there was no valid and fair reason to terminate the respondent on account of negligence. I have to add, here that, the right to work is almost as important as the right to life. Terminating one's employment should be taken with seriousness it deserves given the consequences attached to it on the employee and his family. At least all proper pre-cautions to make sure employees are not victimized for the mistakes they did not commit should be taken.

On the issue of whether the procedure was fair, Rule 13(2) and (3) of the Employment and Labour Relations (Code of Good Practice) Rules G.N. No. 42 of 2007, states: -

> *"(2) Where a hearing is to be held, the employer shall notify the employee of the allegations using a form and language that the employee can reasonably understand.*
>
> *(3) the employee shall be entitled to a reasonable time to prepare for the hearing and to be assisted in the hearing by a trade union representative or fellow employee. What constitutes a reasonable time shall depend on the circumstances and the complexity of the case, but it shall not normally be less than 48 hours"*

The record shows, the respondent testified that he was given a notice to attend a disciplinary hearing on 23rd May 2017. The notice required him to appear before disciplinary hearing on the same day. This was evidenced by exhibit A4 -notice to attend disciplinary hearing. The same is dated 22 May, 2017 and was received by the respondent on the hearing date. It stated: -

> *"Dear Joshua,*

Take note that your disciplinary hearing has been rescheduled to be held on 23 May, 2017 at around 10h00hrs at KK Security disciplinary office."

The respondent was therefore not provided with sufficient time to prepare his defence. The law as shown before requires atleast 48 hours of preparation for a disciplinary hearing.

It is clear to me therefore that since the applicant faulted the fundamental hearing procedure, it cannot be held that the respondent was fairly heard. As fundamental as it is, failure to properly observe the rules as to the hearing proves that there was no procedural fairness in terminating the respondent. Such hearing cannot be allowed to stand. The Court of Appeal in the case of **Dew Drop Co. Ltd v Ibrahim Simwanza**, Civil Appeal No. 244 of 2020 held that: -

"...since the procedure in terminating the respondent was flowed, we find that the termination of the respondent was unfair..."

Upon observation that termination of the respondent was substantively and procedurally unfair, this paves the way to determine the issue of reliefs.

The respondent was compensated a twelve months remuneration, notice, severance pay and certificate of service. I find no reason to interfere with

the finding of the CMA. That being the case, the application fails. It is dismissed, with no order as to costs.

A.K. Rwizile

JUDGE

25.03.2022