

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

REVISION APPLICATION NO. 264 OF 2022

(Arising from an Award issued on 29/4/2022 by Hon. Wilbard G.M, Arbitrator in Labour dispute No.

CMA/DSM/KIN/630/2020/321 at Kinondoni)

MAR-KIM CHEMICALS LIMITED.....APPLICANT

VERSUS

SAID IBRAHIM.....RESPONDENT

JUDGMENT

Date of last Order: 24/10/2022
Date of Judgment: 10/11/2022

B. E. K. Mganga, J.

Facts of this application are that, respondent was an employee of the applicant. It happened that relationship between the two did not go well as a result, on 10th July 2020, applicant terminated employment of the respondent. Aggrieved with termination, on 6th August 2020, respondent filed Labour dispute No. CMA/DSM/KIN/630/2020/321 before the Commission for Mediation and Arbitration(CMA) at Kinondoni complaining that he was unfairly terminated. In the referral Form (CMA F1), respondent indicated that he was claiming to be paid 56 months' salary as compensation, annual leave, One

month salary in lieu of notice, severance pay, terminal benefits and be issued with certificate of service.

On 29th April 2022, Hon. Wilbard G.M, Arbitrator, having heard evidence of the parties, issued an award that termination of employment of the respondent was unfair and awarded respondent to be paid TZS 1,800,000/= being 12 months' salary compensation and TZS 150,000/= being one month salary in lieu of notice all amounting to TZS 1,950,000/=.

Applicant was aggrieved by the said award, hence this application, seeking the court to revise the said award. In the affidavit of Bakari Juma in support of the Notice of Application, applicant raised two grounds namely:-

- 1. That, the arbitrator erred in law and facts in holding that a letter dated 10th July 2020 directed to the respondent was a termination letter.*
- 2. That, the arbitrator erred in law and facts for failure to evaluate evidence of the applicant which proved that there was no termination of employment of the respondent.*

In resisting the application, respondent filed both the notice of Opposition and the counter affidavit.

When the application was called on for hearing, applicant was represented by Bakari Juma, learned Advocate, while respondent was represented by Martine Sangila, learned Advocate.

In arguing the 1st ground of revision, Mr. Juma learned counsel for the applicant submitted that, arbitrator misdirected herself in considering suspension letter (exhibit S1) as termination letter and based on that letter, to award respondent to be paid Tzs.1,950,000/= for unfair termination. Counsel for the applicant submitted further that, there was no termination of employment, rather, it was suspension. In otherwords, counsel for the applicant submitted that there was no termination.

Arguing the 2nd ground, counsel for the applicant submitted that the arbitrator did not properly consider evidence of Godlove Sanga (DWI) which shows that respondent left office after being served with suspension and went to file the dispute at CMA before even being terminated. Briefly as he was, counsel for the applicant prayed that the application be allowed and CMA award be quashed, and set aside.

Resisting the application, Sangila, learned counsel for the respondent responded to the 1st ground that exhibit S1 was not suspending the respondent, rather, was terminating employment of the respondent. He went on that through the said exhibit S1, respondent was informed among other things about his terminal benefits including NSSF contributions. Counsel added that in S1, there are 9 allegations against respondent, but in all those

allegations, respondent was not heard. Counsel submitted that respondent was never called to be heard before the disciplinary hearing.

Responding to the 2nd ground, counsel for the respondent submitted that, respondent did not abscond. He further submit that, respondent filed the dispute at CMA based on S1 that is dated 10th October 2020. He concluded by praying that the application be dismissed for want of merit.

In rejoinder, counsel for the applicant only reiterated his submissions in chief.

I have examined the CMA record and considered submissions made by counsels on behalf of the parties and find that the main issue is whether applicant terminated employment of the respondent or not. The main contention of the parties is centred on exhibit S₁. It was submitted by counsel for the applicant that applicant did not terminate employment of the respondent and that he was merely served with suspension letter (exh. S₁). On the other hand, counsel for the respondent submitted that S₁ was a termination letter and not merely suspension and that respondent's employment was terminated. Counsel for the applicant relied on evidence of Godlove Godwin Sanga (DW1) the only witness who testified on behalf of the applicant. In her evidence, DW1 testified in chief that applicant did not

terminate employment of the respondent, rather, the latter left his work and worked for another employer. DW1 testified further that, respondent committed various misconducts including abscondment, refusal to answer calls and that he was performing poorly, as a result, he was suspended. But while under cross examination, DW1 admitted that she had no proof that respondent was working for another employer at the same time he was working for the applicant. DW1 admitted further that no disciplinary hearing was conducted against the respondent. on the other hand, Said Ibrahim(PW1), the respondent, refuted all allegations relating to the alleged misconducts. He testified further that applicant terminated his employment without affording him right to be heard in the disciplinary hearing committee. He also testified that applicant simply served him with termination letter (exhibit S1).

From the foregoing evidence of the parties, I am of settled opinion that applicant terminated employment of the respondent and that exhibit S1 is not a mere suspension letter, rather, it is a termination letter. The said exhibit supports my findings and conclusion that applicant terminated employment of the respondent as the arbitrator did. The said exhibit S₁ reads as hereunder:-

"

10/07/2020

MAR/SP/35/2020

BARUA YA KUSIMAMISHWA KAZI

Barua hii ni kukujulisha kwamba, wewe Saidi Ibrahim mkataba wako umekatishwa rasmi kutokana na mambo yafuatayo;

1. Mwenendo mbaya usio na maadili.
2. Kutokuripoti ofisini
3. Kukataa kupokea barua rasmi za ofisi
4. Kukataa maelekezo ya mkurugenzi wako.
5. Kutokupokea simu za ofisi na kutojibu ujumbe mfupi
6. Kufanya kazi binafsi mbali na kazi za ofisi
7. Kutokuonyesha kujutia kufanya hayo yote
8. Kukataa kuripoti ofisini
9. Kutokupatikana kwenye simu kwa kukuzima simu

Haki zako za kisheria zitashughulikiwa na wakili wa kampuni. Unaweza kuomba kuonana na wakili na ujibu barua hii hadi mwisho wa mwezi huu.

Mhasibu amegundua kwamba, mchango wa mfanyakazi wa kila mwezi wa NSSF hautolewi kwenye mshahara hivyo, jumla ya mchango wa mfanyakazi utatolewa kwenye haki yako yoyote.

Sgd

Branch Manager."(Emphasis is mine)

Though the heading of the above quoted letter(exhibit S₁) reads as suspension, its content and purpose was termination and in fact, the said letter terminated employment of the respondent. DW1 who, incidentally, is a lawyer for the applicant, admitted in her evidence while under cross examination that she had no proof that respondent was also working for another employer and that no disciplinary hearing was held. Had the applicant

conducted disciplinary hearing, DW1 could have established genuineness of the alleged misconducts allegedly committed by the respondent. To the contrary, applicant proceeded to terminate employment of the respondent without affording him right to be heard. In the application at hand, in terminating employment of the respondent, applicant did not comply with the provisions of Rule 13 of the Employment and Labour Relations (Code of Good Practice) Rules GN. No. 42 of 2007 which encompasses the right to be heard as fairness of procedure for termination. Having a look in the contents of exhibit S₁, it is clear in my mind that applicant was alleging that respondent committed misconducts but the said misconducts were not proved and the procedure was flawed because respondent was not summoned to attend the disciplinary hearing. In the case of *Peter Maghali vs Super Meals Limited*, Civil Appeal No. 279 of 2019 [2022] TZCA 217 the Court found that failure to hold the disciplinary hearing under the pretext that the employee refused to attend violated fair procedure of termination and held that termination was unfair. In the application at hand, applicant served the respondent with termination letter(S₁) though was titled as suspension letter and thereafter did not summon the respondent to the disciplinary hearing allegedly that

respondent absconded. In my view and without mincing words, I hereby hold that termination was unfair both substantively and procedurally.

What I have discussed hereinabove has sufficiently disposed both issues raised by the applicant. In consequence, I uphold CMA award and dismiss this application for want of merit.

Dated in Dar es Salaam on this 10th November 2022.



B. E. K. Mganga
JUDGE

Judgment delivered on this 10th November 2022 in chambers in the presence of Bakari Juma, Advocate for the applicant but in the absence of the Respondent.



B. E. K. Mganga
JUDGE