IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 445 OF 2020

THE REGISTERED TRUSTEES

ALHIKMA FOUNDATION ..... APPLICANT

VERSUS

SULEIMAN M. ABUBAKAR ..... RESPONDENT

(From the decision of the Commission for Mediation and Arbitration at Temeke)

(Amosi: Arbitrator)

dated 14th June 2019

in

REF: CMA/DSM/TEM/470/2018/152/2018

JUDGEMENT

14th February & 16th March 2022

Rwizile J

This application emanates from the decision of the Commission for Mediation and Arbitration (CMA). This Court has been asked to call for the records of the proceedings of the CMA so as to satisfy itself as to the legality, correctness and propriety of an award dated 14th June 2019.

The brief facts behind this case is that the respondent was employed by the applicant as a teacher of Qur'anic studies.

His employment was terminated on 27th July 2018 on grounds of misconduct against his employer. Prior to termination he was charged for absconding from teaching from 15th May to 2nd July 2018.

When asked to show cause, on 03rd July 2018, he admitted absconding from work. He was then summoned to appear in the disciplinary meeting on 09th July 2018. He was found guilty and hence forth terminated.

Being aggrieved with the decision the respondent, he instituted a labour dispute at CMA for unfair termination of his employment contract. The dispute was heard where he partly succeeded. The applicant was dissatisfied, hence this application. Grounds for the application were raised as follows: -

i. *That, whether it was correct for the arbitrator to arrive at the findings that termination of the respondent by the applicant was procedurally unfair for an alleged failure of the chairperson of the disciplinary committee meeting to inform the respondent of its findings.*

ii. *Whether it was compulsory for the applicant to convene disciplinary committee meeting for the determination of the admitted charge.*

iii. *The arbitrator has failed to properly interpret the provisions of Rule No. 4(2) of G.N. No. 42 of 2007, and*

iv. The arbitrator has failed to properly interpret the provision of Rule 4(9) of G.N. No. 42 of 2007

The application was heard by written submissions. The applicant was represented by Mr. Mashaka Ngole, learned Advocates, whereas the respondent appeared in person.

Mr. Ngole argue one issue only, the rest were abandoned. The issue argued is *whether it was compulsory for the applicant to conduct a disciplinary hearing for determination of the admitted charges.*

The learned advocate submitted that it is on record vide the evidence of Dw1 that between 15th May 2018 and 31st May 2018 the respondent absconded from his employment for his trip to Oman. That was done during the period he ought to be working. After he returned, he was asked to show cause why he should not be taken to the disciplinary hearing. The learned Advocate stated further that, the respondent admitted via a letter (which is marked as exhibit D2) that he was out of his work station for two weeks and he did not inform his employer. He stated that the arbitrator found that the respondent's termination was done without a fair hearing because the disciplinary committee did not observe the rules.

He further submitted that; the cardinal principal of law is that disciplinary committee is for determination of the allegation made against the employee but not for the admitted charges. He went on stating that the law requires the employee to be informed of the allegations made against him. In his, this requirement was complied with since he was also given the right to be heard. As a result, the learned advocate added, he admitted to the allegations. With respect, the learned Advocate was of the view that, it was not proper for the arbitrator to hold that the procedure was not followed in terminating the respondent.

The learned Advocate submitted that Rule 9(1) of the GN 42 provides for the procedure to be followed. He argued, the dictates of the rules are to give notice to show cause before the disciplinary hearing committee. This, in his view, depends on the reasons given by the employee.

Also, he referred to Rule 13(1) of GN 42 which enjoins the employer to investigate and form a disciplinary hearing committee. The learned advocate further cited rule 13(11) of GN 42 which exempts an employer from convening a disciplinary hearing in the event the employee consented to the action taken by his employer.

He concluded by submitting that it was wrong for the arbitrator to hold that termination was unfair while the employee had admitted the allegation made against him. He therefore prayed the award be set aside.

In opposing, the respondent submitted that, to argued that termination of the respondent's employment was not fair is afterthought. He added, procedures for the disciplinary hearing were faint and tainted with irregularities. He went on saying that Rule 9(1) (supra) was not complied with by the employer. He therefore held the view that the arbitrator's finding was proper. He alleged that the admission of his absence was a result of the applicant's ill motives against the respondent. He therefore said, it was not voluntarily as required by the law. The respondent then asked this court to dismiss this application for lack of merit.

After going through the submissions, I think the court has been called to determine; *whether there was procedural fairness in terminating the applicant* which is the point raised by the applicant.

It is cardinal to consider section 37(2) of the Employment and Labour Relations Act [CAP 366 R.E. 2019] which provides that: -

"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."

In this application, there is no dispute that the respondent was terminated due to misconduct of absenteeism. This is true of the evidence of Dw1. The respondent, Pw1 does not dispute being absent from duty but pleaded for a good cause. He testified that he asked for the permission from his employer but was denied, he then decided to seize the religious opportunity he never had before. His evidence was in the following terms:

"S. Eleza nini kilitokea?

J. Kupata safari ya kidini ya kwenda kuswarisha Tarawee nje ya nchi, baada ya kurudi safari hiyo ndipo mwajiri wangu alipochukua maamuzi ya kuniachisha kazi.

S. Fursa hizi uliwahi kuzipata kabla ya hapo?

J. Niliwahi kupata kwa ndani ya nchi kwa nje ya nchi hii ni mara moja.

S. Ulitoa taarifa kwa mwajiri wako?

J. Nilitoa taarifa kwa mwajiri wangu na nikaomba ruhusa.

S. Ulipata matokeo ya ombi lako?

J. Nilipata majibu ni kwamba ombi langu lilikataliwa."

There is no dispute therefore that the respondent left his duty without permission. Indeed, he was prevented from leaving but adamantly and without regard to the authority of his employer left without permission. This, in my view, does not only constitute the offence of absenteeism but also insubordination. It is clear therefore that the respondent's conduct was in breach of the General Guidelines for Disciplinary, Incapacity and Incompatibility Policy and Procedure, Guideline 9(1) which is vehement that absence from duty for 5 days constitutes serious misconduct that merits termination. Further Rule 12(3) of the Employment and Labour Relations (Code of Good Practice) [G.N. No. 42 of 2007] provides: -

"(3) The acts which may justify termination are

a) gross dishonest;

b) wilful damage to property

c) wilful endangering the safety of others;

d) gross negligence;

e) assault on a co-employee, supplier, customer or a member of the family of, and any person associated with, the employer; and

f) gross insubordination"

In order to justify the applicant's action of terminating the respondent I have to consult the law. Thus, Rule 12(4) of G.N. No. 42 of 2007 provides:

"In determining whether or not termination is the appropriate sanction, the employer should consider-

a) the seriousness of the misconduct in the light of the nature of the job and the circumstances in which it occurred, health and safety, and the likelihood of the repetition; or

b) the circumstances of the employee such as the employee's employment record, length of service, previous disciplinary record and personal circumstances."

It has been stated that the reason for being absent at work was because the respondent travelled outside the country. That was after being denied permission to do so by his employer.

In this application, I am certain that the employer had a good reason to terminate the respondent. The applicant therefore, proved that termination was fair as provided under S. 39 of ELRA.

In dealing with whether there was procedural fairness in terminating the applicant. Rule 13 of G.N. No. 42 of 2007 provides for the procedures for termination. As the respondent alleges that there was no disciplinary hearing. The court has examined exhibits tendered before the CMA. It is intrusive that after the respondent came back to work, he was asked to state what had happened. It was via a letter exhibit D1 which says;

"YAH: UTORO KAZINI

Tafadhali husika na mada tajwa hapo juu. Nimebaini kuwa hukuwepo katika kituo chako cha kazi kuanzia tarehe 15/05/2018 hadi leo tarehe 02/07/2018 ndio umefika kazini na hukuwa na ruhusa ya kuwa nje ya kituo cha kazi.

Kwa barua hii nakutaka ujieleze kwa maandishi kwanini nisikuchukulie hatua za kukuwajibisha. Tafadhali wasilisha maelezo yako ofisini kwangu si zaidi ya tarehe 03/07/2018 kabla au saa 10:00 alasiri."

The letter was replied by the respondent by admitting to have been absent for two weeks without the permission of his employer, this is exhibits D2. The latter states:

"YAH: KUTOKUWEPO KWANGU KAZINI

Kwa wingi wa heshima na tahadhima naomba uelewe kichwa cha Habari hapo juu, Ninakiri na ninakubali kuwa kuanzia tarehe 15/05/2018 mpaka tarehe 31/05/2018 sikuwepo kazini. Sawa na wiki mbili kamili ambazo ilikuwa ni wajibu kwangu kuwepo kazini, kutokana na kuwa ratiba zilikuwa zinaendelea. Na ninakiri kuwa nilikuwa nje ya kituo cha kazi bila ya ruhusa kutoka katika kituo cha kazi, hii ilisababishwa na safari ambayo ilinikabili. Na ilikuwa nje ya uwezo wangu kutafuta namna ya kuisitisha. Hivyo nikaondoka bila ya ruhusa, lakini cha kunisikitisha ni kuwa nilitaraji sana kuwa utaniruhusu, kutokana na kauli yako uliyowahi kusema kuwa"ninani ambaye amewahi kuja kuomba ruhusa nikamkatalia?" lakini mimi nilipokuja kuomba ruhusa ukanikatalia na ilhali wakati huohuo kuna mwalimu alikuwa hayupo kazini wiki nzima na ruhusa ulimpa wewe, ijapokuwa ndio dharura zinatofautiana, lakini hii ilinisikitisha sana kwasababu unapokuwa kiongozi mahala popote pale, Tume usiwa kuwa waadilifu bila kuangalia huyu wala huyu, ingawa mimi

natambua sana kuwa katika suala la uadilifu unaiitahidi kadri ya Allah alivyo kuwezesha, isipokuwa tu kuna baadhi ya mambo dhidi yangu huwa una msukumo kutoka sehemu nyingine, na hilo mimi nalijua sana, na vile vile kwa upande mwingine nakanusha kunasibishwa na suala la utoro kazini kwasababu mtu aliyetoroka huwa hajulikani alienda wapi na haombi ruhusa au kutoa taarifa ya kutoroka kwake, lakini kuondoka kwangu mimi hakuna mtu aliyekuwa hakujua kuwa flani ameenda sehemu flani na kwa lengo flani, na ruhusa nikaomba na ikakataliwa lakini tu ninavyo amini mimi nikuwa kuna jambo tu linatengenezwa, kwasababu waswahili husema ukitaka kumuua Mbwa, mwite jina baya."

The respondent alleged that his termination did not follow the procedure since there was no disciplinary hearing. After perusing CMA records, there is exhibit D3, which is minutes of disciplinary hearing. In that hearing the respondent pleaded guilty and asked for forgiveness. This shows what has been alleged by the respondent was not true. This court is of the opinion that taking through exhibits D1, D2 and D3, I am bound to hold that the procedure for termination was followed.

The court is of the view that, the respondent did not take his work seriously. First, he left his work place even though he was denied

permission by his employer as per exhibit P1. He left his work during examination period. That being the case, I find that, the termination of the respondent was both substantively and procedurally fair. Therefore, the application has merit. For the foregoing reason, the decision of the Commission is hereby quashed, all orders set aside. No order as to costs.

A. K. Rwizile

JUDGE

16.03.2022