IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

DAR ES SALAAM

REVISION NO.405 OF 2021

BETWEEN

FRANSISCO BONIPHACE KASHANGAKI ..... APPLICANT

AND

GLOBAL PACKAGING (T) LTD.....RESPONDENT

JUDGMENT

Date of last order: 07/02/2022
Date of Judgement: 18/02/2022

B.E.K. Mganga, J.

The applicant herein was employed by the respondent on 9th December 2017 for a fixed term contract which was renewed several times. The two maintained their employment relationship until 9th January 2019 when applicant was terminated on ground of gross negligence. It was alleged by the respondent that on 29th November 2018, applicant was assigned to deliver goods to the respondent's client at Kisarawe area. It was also alleged by the respondent that, in the discharge of that duty, applicant drove Motor vehicle with registration No. T954 DKE Make Nissan, knowingly that the said motor vehicle had

mechanical defects. It is said that while on the way to the respondent's client at Kisarawe, without permission, applicant carried his co-employee by the name of Yunis Mange and that they got an accident which resulted to damage of the aforementioned motor vehicle and amputation of an arm of the said Yunis Mange. It was on the basis of that accident; applicant's employment was terminated on ground that he was gross negligence and that he carried a co-employee in the said motor vehicle without authorization.

Aggrieved with termination of his employment, applicant filed the dispute before the Commission for Mediation and Arbitration (hereinafter referred to as CMA) complaining that his employment was unfairly terminated by the respondent. On 1st November 2019, Hon. Mwalongo, A, arbitrator, delivered an award in favour of the respondent that termination of applicant's employment was both substantively and procedurally fair.

On the second bite, applicant knocked this court's door imploring the court to revise and set aside the CMA's award. In the affidavit in support of the application applicant raised three grounds namely: -

1. *That, the trial arbitrator erred in law and fact for not finding that termination was substantively unfair due to absence of valid reason.*

2. *That, the arbitrator erred in law and fact on failure to find that termination was procedural unfair due to the fact that, he was not granted an opportunity to appeal against the disciplinary committee as he was terminated on the same day of disciplinary committee hearing.*

3. *That, the trial arbitrator was obviously and unfairly biases in favour of the respondent that did not consider the importance of police accident report in determining the cause of accident towards his liability.*

In opposing the application, respondent filed a counter affidavit of Ms. Debora Kilimba, her Principal Officer.

When the application was called for hearing, parties prayed the same be disposed by way of written submissions and an order was issued to that effect.

Submitting in support of the application on the 1st ground Mr. George Pallangyo, Advocate, argued that there was no valid reason for termination of applicant's employment. Counsel submitted that applicant was unfairly terminated based on grounds that he carried a co-employee contrary to respondent's policy and gross negligence that caused an accident and damage of respondent's property. Counsel for applicant submitted that applicant was authorized to carry Yunis Mange in the said motor vehicle after the said Yunis Mange had secured a permission from the respondent's human resources officer. Counsel for the applicant went on that there is no proof that the respondent's policy prohibited

carrying other employees on the said motor vehicle. To bolster his submission, counsel for the applicant cited Rule 12(1)(a) and (b)(ii) of the Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007. On the cause of the accident, counsel for the applicant submitted that, it was due to mechanical defects and that reasons for termination of the applicant were malicious and ridiculous.

On the 2nd ground, counsel for the applicant submitted that Mr. Linus Haule (DW1) was the complainant and chairperson of the disciplinary proceedings hence likelihood of bias.

As regard to the 3rd ground of revision, it was Mr. Pallangyo's contention that, it was not proved that the accident was caused by applicant's negligence as no Traffic Police report was tendered in evidence. He argued that respondent's witnesses testified that they were informed by police that accident was due to over speed, but no report was tendered.

Responding to the applicant's submissions, Mr. Walter Shayo, counsel for the respondent submitted that there were valid reasons for termination and the same were proved by evidence of both DW1 and DW2 who testified on behalf of the respondent. Counsel for the respondent submitted further that, applicant knew that the motor

vehicle had mechanical defect, nevertheless, he drove it over speed and caused an accident. Mr. Shayo concluded that applicant was gross negligence and cited the case of ***George T. Peter and Another v. Higher Education Students Loan Board,*** Rev. 509/2019 (unreported) on what amounts to gross negligence. More so, on validity of reasons for termination, counsel for the respondent submitted that applicant carried Yunis Mange, a fellow employee, on the motor vehicle he was deriving, without prior permission of the respondent.

On the 2nd ground, counsel for the respondent submitted that, composition of the disciplinary hearing committee was not raised at CMA as such cannot be raised at this stage. In support of that position, counsel for the applicant cited the case of ***Donald Katakweba v. Dawasco,*** Rev.No.905/2019 (unreported). Responding to the 3rd ground, Mr. Shayo, submitted that evidence of the respondent proved that applicant caused accident due to over speed as it was testified by DW2.

In rejoinder, Mr Pallangyo reiterated his submission in chief. Counsel for the applicant submitted that Mr. Linus Haule who, according to evidence adduced by all witnesses, gave permission to Yunis Mange, the latter being alleged to have been carried by the

applicant on the aforementioned motor vehicle without permission of the respondent, which is one of the reasons for termination. Counsel for the applicant submitted that Mr. Linus Haule was supposed to be a witness at the disciplinary hearing committee, instead, he was made the chairperson. Counsel for the applicant maintained that, under the circumstances of this application, Traffic Police Report was key but was not tendered.

I have carefully scrutinized the evidence on record and find that employment of the applicant was terminated based on two reasons namely, (i) gross negligently driving that resulted into an accident which damaged motor vehicle No. T953 DKE, Make Nissan, the property of the respondent and (ii) carrying Yunis Mange, also an employee of the respondent, on the said motor vehicle without prior permission of the respondent. Rival arguments of counsels both at CMA and before this court was based on these two reasons for termination. Counsel for the applicant was of the view that termination of employment of the applicant was done maliciously but counsel for the respondent was of different view.

The issue that has exercised my mind is whether there was proof that an accident and damage of the aforementioned motor

vehicle was due to gross negligence of the applicant or not. I have carefully read evidence of Elias Wasonga (DW2) and find that applicant informed him that the motor vehicle had mechanical defects prior he drove to Kisarawe. In other words, respondent was aware of defects, yet allowed applicant to drive the said motor vehicle. Fransisco Boniphace, the applicant, testified that at the time he was descent a hill, it occurred mechanical defect and tried to stop the vehicle but unable as a result he got an accident. In his own words, applicant (PW1) is recorded stating: -

> *"...Tarehe 29/11/2019 niliambiwa nipeleke mzigo Kisarawe. Nilipokuwa njiani kwenye kona na mteremko, gari ilifeli krachi na kwa bahati mbaya gari iligonga kwenye gema..."*

This evidence was not shaken during cross examination.

Respondent has relied on exhibit FB 1 and argue that applicant was at high speed and the information received from Traffic Police. With this submission, it appears in the mind of the applicant that every accident is due to over speed. This wrong think has captured many people as to the cause of accidence when it occures. Law, J (as he then was), cautioned this type of thinking in the case of ***Regina (Prosecutrix) v. John Wallace***, Law Report Supplement (No.2 of 1959) to "The Tanganyika Gazette" dated the 17th April 1959 that: -

*"...that no principle or rule of general application...as every collision case involves the decision of questions of facts; and issue of negligence in such cases cannot be decided involving a different set of fact...that no case is exactly like the another...**Because an accident does occur it does not follow that a person has driven dangerously or without due care and attention**. But if he has, it matters not why he did so. Suppose a driver is confronted with a sudden emergency through no fault of his own. In an endeavour to avert a collision he swerves to his right...It is not the law that the driver of a vehicle who run into the rear of a preceding vehicle is necessarily guilty of careless driving. To support a conviction for driving without due care and attention there must be evidence of negligence."*

In my careful examination of evidence, I have found that there is no evidence proving that applicant was negligent because the information relating to Traffic Police cannot be relied upon as the same is hearsay. On the other hand, Exhibit FB 1 was illegally admitted as there was objection raised by the applicant that the said document does not belong to him. It is not indicated as to whether, respondent was asked to comment on the objection raised by the applicant. Instead of allowing the parties to give reasons for and against, the arbitrator simply admitted it without assigning reasons. During cross examination at the time applicant was giving his evidence, respondent did not bother to cross examine on the said exhibit FB 1. Failure of the respondent to cross examine applicant on exhibit FB 1, while aware that applicant disowned the said exhibit,

means that respondent impliedly conceded that the said exhibit has nothing to do with the applicant. Exhibit FB 1 was tendered by Linus Haule (DW1) but DW1 said nothing especially after applicant has objected to its tendering as to how does it relate to the applicant. DW 1 did not testify that the said exhibit was submitted to him by applicant to tie it with the applicant. In addition to that, I have examined the said exhibit FB1 and find that the same was not signed by the applicant and there is no proof that it was written by the applicant. I therefore expunge it from the record. After expulsion of exhibit FB 1 from evidence, the only evidence relating to the cause of accident is the alleged information from Traffic Police, which is hearsay, and that of the applicant, that the accident was due to mechanical defects. In short, apart from the evidence of the applicant that an accident was caused by mechanical defects, there is no any other evidence to prove otherwise. It was argued that applicant knew that the motor vehicle had mechanical defects and proceeded to drive it hence he was negligent. In my view, if it is a matter of negligence, both applicant and respondent have a share to blame because DW2 was informed that the motor vehicle had mechanical defect yet allowed applicant to drive it. The duty of care

was on both applicant and respondent. it was not only to the applicant. Both applicant and Respondent had duty of care and were bound to ensure that the motor vehicle is road worth before being driven. To punish only the applicant in these circumstances, is unfair. Therefore, in my view, this cannot be a base of termination.

Apart from that, termination of employment of applicant was based on ground that he carried Yunis Mange, a fellow employee without prior permission contrary to policy of the respondent. I have read evidence of Elias Wasonga (DW2) and find that he admitted in his evidence in chief that the said Yunis Mange sought permission to go out of office and that the same was granted by Mr. Haule (DW1). In his evidence, DW1 said nothing in relation to permission of the said Yunis Mange. We are not told the nature of the permission and information that was given to DW1 by Yunis Mange that led DW1 to give permission. It is unclear whether the said Yunis Mange told DW1 that she will accompany the applicant to Kisarawe or not. All these were supposed to be resolved by evidence of the respondent, but it was not.

It was argued on behalf of the respondent that it was contrary to the respondent's policy to carry another person on the motor

vehicle without prior permission. This argument was countered by counsel for the applicant that there is no proof that the respondent's policy prohibited carrying other employees on the said Motor vehicle. I agree with that submission as the said policy was not tendered in evidence for the arbitrator or this court to confirm that the said policy was in existence. Counsel for the applicant submitted further that there is no proof even if we assume that the policy was existing, that it was complying with the provisions of Rule 12(1)(a) and (b)(ii) of the Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007. In terms of this rule, I am required to consider whether the alleged policy was clear and unambiguous. As the alleged policy was not tendered, I am unable to assess whether it was clear or not. I am therefore left with nothing. Respondent was duty bound to prove all these, but she failed. For the fore going I hold, that the second ground/ reason for termination of applicant's employment fails.

For all what I have discussed hereinabove, I hold that there were no valid reasons for termination. In short, termination of employment of applicant was substantively unfair. This disposes all

other ground. I therefore allow the application, quash and set aside the CMA award.

According to the evidence of both DW1 and PW1, applicant's employment contract was terminated on 9th January 2019 while his employment contract was expiring on 11th June 2019. In other words, employment contract of applicant was terminated six months prior to its expiry. Applicant is therefore entitled to be paid salary of six months of unexpired contract. According to the evidence of DW1 which was not challenged by the applicant, applicant's salary was TZS 350,000/= per month. Applicant is therefore entitled to be paid TZS 2,100,000/= as salary for the unexpired period of the employment contract. Applicant is further entitled to be paid TZS 350,000/= as one-month salary in lieu of notice and certificate of service. For clarity, applicant is entitled to be paid TZS 2,450,000/=.

Dated at Dar es salaam this 18th February 2022.

B.E.K. Mganga
JUDGE