

**THE HIGH COURT OF TANZANIA**

**LABOUR DIVISION**

**AT DAR ES SALAAM**

**REVISION APPLICATION NO. 416 OF 2021**

*(Originating from the Award issued on 27<sup>th</sup> March 2020 by Hon. Mbena E.S, Arbitrator, in  
Labour dispute No. CMA/DSM/KIN/1197/18/42 Kinondoni)*

**BETWEEN**

**GEOFREY MWALUHWAVI.....APPLICANT**

**AND**

**BAYPORT FINANCIAL SERVICES (T) LTD.....RESPONDENT**

**JUDGMENT**

*Date of last Order: 16/05/2022  
Date of Judgment: 06/06/2022*

**B. E. K. Mganga, J.**

On 5<sup>th</sup> July 2006, applicant entered unspecified contract of employment with the respondent in the position of operations Assistant/Driver. On 28<sup>th</sup> November 2018, respondent terminated employment contract of the applicant on ground that applicant misappropriated property of the respondent. Aggrieved by termination, on 17<sup>th</sup> December 2018, applicant filed Labour Dispute No. CMA/DSM/KIN/1197/18/42 before the Commission for Mediation and

Arbitration (CMA) at Kinondoni claiming to be paid TZS 3,630,092/30 as severance pay for 10 years and TZs 16,179,840 being 12 months' salary compensation all amounting to TZS 19,809,933/30 for unfair termination. On 27<sup>th</sup> March 2020, Hon. Mbena, M.S, Arbitrator, issued an award dismissing the claim by the applicant on ground that termination was both substantively and procedurally fair.

Applicant was aggrieved by the said award, as a result, he filed this application for revision. In the affidavit in support of the application, applicant raised three grounds namely: -

- i. That, Honourable arbitrator erred in law and fact for failure to analyze, interpret the testimony and evidence tendered by the applicant with regard to the claims and adduced by the respondent.*
- ii. That, Honorable arbitrator erred in law and fact for holding the applicant accountable for the thing which was under police investigation.*
- iii. That, Honourable arbitrator erred in law and fact for holding that there was fair termination basing on circumstantial evidence adduced by the respondent.*

In opposing the application, respondent filed the Counter affidavit of Hassan Mussa, her learned counsel.

By consent of the parties, the application was disposed by way written submission. In complying with written submission order,

Applicant enjoyed the service of Mr. Paschal Temba, his Personal representative while the respondent enjoyed the service of Mr. Hassan Musa, learned counsel.

In support of the application, Mr. Temba, argued in the 1<sup>st</sup> ground that, the production of the CCTV camera was not in compliance with Section 18(2)(a), (b), (c), (d) of the Electronic Transaction Act No. 3 of 2015. He submitted further that, CCTV Camera did not show applicant stealing the motorcycles or in any how, his any involvement. He insisted that, arbitrator failed to analyze and interpret the testimony and evidence tendered by the applicant regarding the respondent's claims, hence caused injustice to the applicant.

On the 2<sup>nd</sup> ground, Mr. Temba submitted that in terms of Section 37 of the Employment and Labour Relations Act [Cap. 366 R.E. 2019], termination of employment must be on a fair reason and procedure. He submitted further that, an employer is prohibited from taking any disciplinary actions against an employee who is in custody for committing a misconduct of a criminal nature and has been charged with a criminal offence until final determination of the criminal case. He

referred the court to the provisions of Section 37(5) of Cap. 366 R.E. 2019 (supra) and cited the case of ***Stella Manyahi & Another vs Shirika la Posta***, Reference Case No.02 of 2010 to that effect. He further submitted that; respondent disregarded the requirement of Section 37(5) of Cap.366 R.E. 2019 because she conducted disciplinary hearing while she has reported the matter to the police for investigation.

Regarding the 3<sup>rd</sup> ground, Mr. Temba submitted that, termination of employment is a matter of procedure and not circumstances. He went on that an employer must have a reason for termination and must comply with procedures of termination. He argued that, in the matter at hand, the arbitrator considered only circumstantial evidence adduced by the respondent and ignored evidence applicant's evidence. He further submitted that, it is the duty of the employer to prove fairness of termination both substantively and procedurally as provided under Section 39 of Cap. 366 R.E. 2019. He therefore prayed the CMA award be revised and set aside.

In rebuttal, Mr. Mussa, learned counsel for the respondent, commenced his submission by raising a preliminary objection to the



effect that, the application is hopelessly time barred. He submitted that on 1<sup>st</sup> October 2021 this court, (Hon. Arufani, J), in Miscellaneous Application No. 316 of 2020 granted leave to the applicant to file his application within fourteen (14 days) from the date of the order but the applicant filed the application online on 12<sup>th</sup> October 2021 and lodged hard copies before this Court on 22<sup>nd</sup> October 2021. He submitted further that, filing of an application online does not complete the filing process. He argued that online filing is just a step to ease admission of documents before they were received in court. To support his submission, he referred the case of ***Mwaija Omary Mkamba v. Mohamed Said Msuya & 2 Others***, Land Appeal No.142 of 2020. Counsel for the respondent further submitted that, applicant made a proper filing on 22<sup>nd</sup> October 2021 after a lapse of 8 days provided in the said order. He thus prayed for dismissal of the application.

Responding on the grounds of Revision, Mr. Mussa submitted that, Mr. Temba in his submission, did not state how the arbitrator failed to analyze, and interpret evidence tendered. Counsel for the respondent submitted that, the personal representative of the applicant in his submissions attacked evidence relating to CCTV Camera footage while in

there was no CCTV camera footage that was tendered as exhibit. What was tendered by DW3, the Respondent's Forensic Manager, was investigation report that was admitted as exhibit B7. He argued further that, applicant has failed to support his claim in the first ground.

In the 2<sup>nd</sup> ground, Mr. Mussa submitted that, respondent complied with all procedures required by the law for termination. He submitted further that; investigation was conducted by an internal investigator who came into conclusion that applicant committed the misconduct charged with. He went on that during internal investigation, the matter was reported to police for compliance with laws. He further submitted that, the respondent was right to conduct disciplinary proceeding against the applicant because Section 37(5) of Cap. 366 R.E. 2019 (supra) prohibits termination or taking disciplinary action while criminal proceedings and or appeal are pending and not police investigation. To support his argument, he cited the case of ***Trustees of Tanzania National Park vs. Majuto O. Chikawe & George S. Saina***, Rev. No. 15 of 2020.

Regarding the 3<sup>rd</sup> ground, Mr. Mussa submitted that, applicant's termination was substantively and procedurally fair. Counsel for the

respondent relied on the evidence of DW3 in relation to what he saw in the CCTV camera.

I should point out that applicant opted not to file a rejoinder submission.

Before considering the matter on merit, I will determine the Preliminary objection raised by the respondent that, the application was filed out of time contrary to the court's order dated 1<sup>st</sup> October 2021. This issue cannot detain me because Rule 21(1) of the Judicature and Application of Laws (Electronic filling) Rules, 2018 GN. No. 148 of 2018 is very clear that, the application is said to have been filed on the date when the application was submitted electronically. The Rule provides: -

*"21(1) A document shall be considered to have been filed if it is submitted through the electronic filing system before midnight, East African time, on the date it is submitted, unless specific time is set by the court, or it is rejected."*

It is undeniable fact that, applicant was given fourteen (14) days from 1<sup>st</sup> October 2021 to file a proper application and he filed the application on 12<sup>th</sup> October 2021. The application was therefore filed within time. I hereby dismiss the preliminary objection.

The arbitrator is being criticized for failure to analyze and interpret evidence adduced by the applicant. I have carefully examined the CMA record and considered submissions made on behalf of the parties in relation to this ground and find that the criticism is not justified. I have read the award and find that the arbitrator analyzed and considered evidence of the applicant and that of the respondent and concluded that the case was not proved at the balance of probability. The arbitrator believed evidence of Suzan Kolimba Kapinga (DW1), Mercy Mgongolwa (DW2) and Bruce Juma Wafula (DW3) to be true and I see no reason to disbelieve them. In fact, DW3 testified on what he saw in the CCTV camera during his internal investigation. It is in evidence of DW3 that applicant and the security guard were seen on CCTV camera struggling to switch on the lights which they disturbed the CCTV camera battery until the camera went off but after few minutes, the camera was turned on and that over the sudden, the two motorcycles were not there. This was oral evidence, and no CCTV camera footage was tendered. This evidence was not shaken hence credible. It is my view therefore that, the complaint by applicant in relation to non-compliance with the



provision of Section 18(2)(a), (b), (c), (d) of the Electronic Transaction Act No.3 of 2015 is unfounded and is hereby dismissed.

In his evidence, Geoffrey Michael Mwaluhwavi (PW1) while testifying in chief is recorded stating: -

*"Siku ya tukio mimi baada ya kazi niliporudi ofsini kushuka chini kweli pikipiki hazikuwepo. Mimi nilimpigia simu dereva mwenye dhamana ya pikipiki hakupokea **niliamua kumtumia ujumbe asitoe taarifa kuhusu upotevu wa pikipiki mpaka pale atakapopewa maelekezo.**"*

While under cross examination, applicant (PW1) is recorded stating as follows: -

*"...hizo pikipiki 6 mimi nilipewa namba ya dereva anayezipeleka kuzisafirisha na zilitakiwa kusafirishwa pikipiki 3...zilibaki mbili...Tulipokuwa tunapakia pikipiki tulikuwa 5 baadaye wengine waliondoka tukabaki mimi, dereva Mohamed Selemani na mlinzi. Baada ya dereva kuondoka zilibaki pikipik 3 na nilibaki mwenyewe... zimeibiwa 2..."*

From the foregoing, I hold that there was valid reason for termination. From the quoted part of evidence of the applicant, it is clear that, he directed the driver not to report the incidence. In the CMA record or in his evidence, applicant did not offer any explanation as to why he asked the driver not to report the incidence. In my view, that conduct, is an indication that he participated and knows exactly what

happened to the said motorcycle that got lost. This also covers the 3<sup>rd</sup> ground because there was valid reason for termination and the same was proved by evidence as discussed hereinabove.

I have carefully examined the CMA record and find that procedure for termination was also adhered to. Evidence that was adduced on behalf of the respondent examined closely with that of the applicant supports this conclusion. The records reveal that, applicant was afforded right to be heard.

In the 2<sup>nd</sup> ground, it was submitted by Mr. Temba, the personal representative of the applicant that, respondent acted contrary to the provisions of Section 37(5) of Cap. 366 R.E. 2019 (supra) by conducting disciplinary procedures while criminal investigation was going on. It is true that the law under Section 37(5) of Cap.366 R.E. 2019 (supra) prohibits an employer from taking any disciplinary action in terms of penalty, termination or dismissal to an employee who has been charged with a criminal offence which is substantially the same until final determination by the court and the appeal thereto. In the matter at hand, it is undisputed that respondent reported the matter to police for

investigation, but there is no evidence that applicant was charged and brought before the court for determination of the said charges. Therefore, it is my view that the said provision of the law is not applicable in the circumstance of this application. That being the position, cases cited by Mr. Temba on behalf of the applicant is not applicable in the circumstances of this application. It is my considered opinion that respondent was right to proceed with the disciplinary hearing against the applicant. Section 37(5) of Cap. 366 R.E 2019(supra) provides: -

*"37(5) No disciplinary action in form of penalty, termination or dismissal shall lie upon **an employee who has been charged with a criminal offence** which is substantively the **same until final determination by the Court** and any appeal thereto".*

It is clear in my mind from the quoted section, especially the bolded words, that there must be a charge filed in court for the offence that is substantively similar to the alleged misconduct against the employee for the employer to be barred to take any disciplinary action against an employee. That section does not bar an employer to report a criminal offence against an employee and thereafter take action while criminal investigation is still underway. I therefore associate myself with the

holding in ***Majuto's case*** (supra) that an employer is prevented to take disciplinary action only when there is a pending criminal case before the court and not the report of a criminal case to police or pending criminal investigation.

For the foregoing and in the upshot, I find that the application has no merit and dismiss it.

Dated at Dar es Salaam this 6<sup>th</sup> June 2022.

  
B. E. K. Mganga  
**JUDGE**

Judgment delivered on this 6<sup>th</sup> June 2022 in the presence of Paschal Temba, Personal Representative of the applicant and Hassan Mussa, Advocate, for the Respondent.

  
B. E. K. Mganga  
**JUDGE**

