

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

REVISION APPLICATION NO. 15 OF 2022

*(Arising from an award issued on 26/11/2021 by Hon. Msina, H.H, Arbitrator in Labour dispute No.
CMA/DSM/KIN/28/21/17/21 at Kinondoni)*

BETWEEN

G4S SECURE SOLUTIONS (T) LIMITED APPLICANT

AND

MERTUS KAIJAGE RESPONDENT

JUDGMENT

*Date of last Order: 17/05/2022
Date of Judgment: 13/06/2022*

B. E. K. Mganga, J.

On 19th November 2020, applicant entered a one-year fixed term contract of employment with the respondent as a Security Guard. The said fixed term contract was expiring on 18th November 2021 but was terminated on 25th March 2021 on ground that respondent fought while on duty. It was alleged that on 16th March 2021, respondent while on duty, did fight with Mr. Komba, a fellow employee who came to re-leave him from duty on the said day. Aggrieved with termination, respondent

filed a labour dispute before the Commission for Mediation and Arbitration (CMA) claiming to be paid 12 months' salary compensation for unfair termination, two months' salary arrears, overtime and annual leave pay.

On 26 November 2021, Hon. Msina, H.H, Arbitrator, issued an award in favour of the respondent as she found that termination was unfair for want of reason and ordered the applicant to pay TZS 2,093,600/= being salary compensation for eight (8) months remaining period on the fixed term contract and TZS 261,700/= being one month salary in lieu of notice all amounting to TZS 2,355,300/=.

Applicant was dissatisfied with the award, as a result, she filed this application imploring the court to revise it. In the affidavit of Imelda Lutebinga, the principal officer of the applicant, in support of the notice of application raised two issues namely: -

- i. *Whether the award is tainted with illegality on face of record.*
- ii. *Whether the arbitrator erred in law and facts for failure to assess and / analyze the evidence both oral and documentary tendered by the applicant henceforth reached on a wrong final decision.*

In opposing the application, respondent filed his counter affidavit.

At the hearing of the application, applicant was represented by Mr. Mosses Kiondo, learned counsel, while the respondent appeared in person.

Mr. Kiondo, learned counsel, submitted on the 1st issues that, the award is tainted with illegalities. Counsel for the applicant submitted further that the respondent had a fixed term contract expiring on 18th November 2021 but was terminated on 25th March 2021 being eight (8) months prior its expiry. He added that, respondent's salary was TZS. 150,000/= per month. He went on that, the arbitrator awarded the respondent TZS. 2,500,000/= based on the salary which is different from the one in his contract.

On the 2nd issue, Mr. Kiondo submitted that the arbitrator failed to analyze evidence of the parties. He submitted further that, before termination of employment of the respondent, applicant did adhere to the provisions of Rule 9(1) of Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007. He went on that, respondent was paid salary to the date of termination and leave arrears. He therefore prayed the application be granted.

In reply, respondent submitted that, submissions that his salary was TZS 150,000/=, is not supported by evidence in the CMA record. He submitted further that, his salary was paid per hour, that is why, the amount was not fixed and referred to exhibit D7 which was tendered by the applicant to show that his salary was above the alleged TZS. 150,000/=.

On the 2nd issue, respondent submitted that his termination was unfair for want of procedure. It was alleged that he fought with his fellow employee but that was not proved. He submitted further that, the chairperson of the disciplinary hearing committee was incompetent to chair the committee because he was from the same company and that he was not a Senior Manager. He added that, he was notified of the disciplinary hearing through SMS at 12:00 hrs requiring him to attend the disciplinary hearing at 14:00 hrs. He went on that, no witness was called to prove the allegations against him. He therefore prayed the application be dismissed.

In rejoinder, Mr. Kiondo submitted maintained that respondent's salary was TZS 150,000/=. He submitted further that, the person who chaired the disciplinary hearing was the Zonal Manager and respondent

did not raise any objection. Counsel conceded that the minutes of the disciplinary hearing (exhibit D5), does not show that applicant's witness testified hence respondent was not afforded with a right to cross-examine the intended witness for the applicant.

I have examined the CMA record and considered submissions of the parties in this application. In disposing this application, for obvious reasons, I will begin with the 2nd complaint that arbitrator failed to analyzed evidence. I have read the award, the subject of this application and the CMA award and find, in my view, that the arbitrator fairly analyzed evidence of the parties. The complaint of the applicant that the arbitrator did not analyze evidence is based on salary awarded to the respondent. Counsel for the applicant submitted that respondent's salary was TZS 150,000/= per month according to the fixed term contract the parties entered, but respondent submitted that it was above that because he was paid in terms of hours, which is why, it kept changing. With due respect to counsel for the applicant, his submissions that the fixed term contract shows that respondent's salary was TZS 150,000/= per month is not supported by evidence on record. I have read the said fixed term contract of employment and find that clause 3.1. of the said

contract is clear that, the basic wage of the respondent was TZS 769.23 per hour before and after probation, for the first 195 hours worked in any day. The said contract is clear further that, overtime hours being addition to the excess of basic hours will be calculated based on the formular shown in the said fixed term contract. Therefore, the amount of salary payable to the respondent was depending on the numbers of hours worked for in that month. More so, in his evidence, Emmanuel Hotay Akonay (DW1) the only witness who testified on behalf of the applicant did not state that respondent's salary was TZS 150,000/= . I therefore dismiss this ground.

It was submitted by counsel for the applicant that Rule 9(1) of GN. No. 42 of 2007 was complied with before termination of the respondent. In short, according to his submissions, there was fair a reason for termination and procedures were adhered to. On his part, respondent contended that his termination was procedurally unfair and that the alleged misconduct of fighting while on duty was not proved.

I have carefully examined evidence of the parties and I am of the considered opinion that the alleged misconduct was not proved. My reason for this conclusion is not far. In his evidence, DW1 tendered the

respondent's statement that was recorded on 16th March 2021 and admitted as exhibit D2. I should point that exhibit D2 was recorded on the same date the alleged fight occurred. In the said exhibit, respondent stated that, while at work, he was invaded and assaulted by Mr. Komba Tobias, his fellow employee. Exhibit D2 shows further that the said Komba Tobias was forcing the respondent, who was on duty, to leave his duty post to the said Komba Thomas unprocedural and unprofessionally. I should point out that this is evidence of the applicant supporting evidence of the respondent (PW1) who gave the same story in his evidence. The same story is reflected in the proceedings of the disciplinary hearing (exh. D5) that was also tendered by DW1. This evidence is corroborated by the judgment by Hon. T. M. Rwambali (Magistrate) in Criminal case No. 237 of 2021 at Kariakoo Primary Court between ***Mertus Kaijage v. Tobias Komba*** (accused) exhibit AP4 and the Police Form No. 3 (PF.3) exhibit AP2 and AP3 which shows that respondent had bruises on the right side of his face about 3x2cm. it is my view that under normal circumstances, it does not make sense that while Mr. Komba was assaulting him, respondent just stayed still and watched his demise. Obviously, he defended for his life. But the main issue is, who was the cause of the saga? Applying the "but for test

principle”, namely, that had it not been the said Thobias Komba who went to the duty station of the respondent and forcefully and unprocedural wanted to remove the respondent from work, this could have not happened. Evidence in CMA record shows that respondent was on duty and at duty station but not the said Thobias Komba. Evidence shows further that, the incidence occurred after sunset i.e., when darkness had started. In my view, any reasonable person, i.e., professional guard, would have believed that there is hidden agenda namely; that the said Thobias Komba wanted the respondent to leave his duty place while he (respondent) has signed that he was on duty and thereafter some people commit crime thereat and make the respondent liable. Had the respondent succumbed to the pressure by the said Thobias Komba and left the duty station on that night and an offence committed thereat, then, the first suspect would have been the respondent who was assigned to guard the area on the fateful date and not Thobias Komba. This could have been more detrimental to the respondent because even the applicant could have come with a defence that the person who was assigned is the respondent and not the said Thobias Komba. I am of that view because it is not disputed that respondent was on duty already and that the said Thobias Komba was

not on duty. If at all the said Thobias was directed by the applicant to relieve the respondent who entered on duty few hours before the incidence and was supposed to be on duty the whole night, then, senior officers of the applicant were supposed to accompany the said Thobias Komba and order the respondent to leave the duty station and notas it happened. I would say, from what I have observed from the evidence in this application, applicant contributed for this saga to happen. With that light touch comment, applicant should find a way on how to ensure that conflicts are minimized in his workstations otherwise she may be liable in future or lose customers. Since applicant contributed for the saga to happen, it was unfair to terminate the respondent based on managerial failure of the applicant herself. More so, in his evidence, applicant did not disclose whether a similar sanction of termination was imposed to the said Thobias Komba or not. I am of the view that applicant might have applied double standard but that is not an issue in this application. As pointed hereinabove, there was no valid reason for termination.

It was submitted by the respondent that the chairperson of the disciplinary hearing was incompetent because he was from the same company and that he was not a senior manager. With due respect to the

respondent, there is no law providing that the chairperson of the disciplinary hearing should not be from the same company or office. What the law demands is that the chairperson must be from the senior managerial. In the CMA record, there is no evidence showing that the chairperson was not one of the senior managers. In addition to that, in his evidence at CMA, respondent did not raise that issue. In fact, Guideline 4 of the Guidelines for Disciplinary, Incapacity, Incompatibility Policy and Procedure issued under the Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007 provides criteria as who should be the chairperson of the disciplinary hearing but does not provide that must be from another office. The only restriction provided under the law is that the chairperson should not be involved in the issues giving rise to the hearing.

I have examined proceedings of the disciplinary hearing (exh. D5) and find that no witness was called by the applicant. In other words, no evidence was adduced to prove the allegations against the respondent. To the contrary, respondent was called to testify and prove his innocence. Exhibit D5 shows that respondent was cross examined by the applicant while there was no evidence adduced by the applicant. In my

view, this procedure is not proper. In short, the procedure for termination was flawed.

For the foregoing, I hold that termination of employment of the respondent was both substantively and procedurally unfair. I therefore uphold the CMA award that applicant should pay TZS 2,355,300/= to the respondent and dismiss this application for lack of merit.

Dated at Dar es Salaam this 13th June 2022.


B. E. K. Mganga
JUDGE

Judgment delivered on this 13th June 2022 in the presence of Moses Kiondo, Advocate for the applicant and Mertus Kaijage, the Respondent.


B. E. K. Mganga
JUDGE

