

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

REVISION APPLICATION NO. 29 OF 2022

(Arising from an Award dated 5th October 2021 issued by Hon. M. Batenga, Arbitrator, in Labour dispute No. CMA/DSM/TEM/402/19/173 at Temeke)

BETWEEN

KIOO LIMITED APPLICANT

AND

NASIBU MKOLELE JUMA RESPONDENT

JUDGMENT

Date of last Order: 14/06/2022
Date of Judgment: 27/06/2022

B. E. K. Mganga, J.

On 1st October 2010 the applicant employed the respondent as a Cullet Processing Supervisor. On 2nd September 2019, applicant terminated employment of the respondent on ground of misconduct. Dissatisfied with termination, respondent referred the matter to the Commission of Mediation and Arbitration (CMA) claiming that he was unfairly terminated. M. Batenga, arbitrator, having heard evidence of the parties issued an award that respondent was unfairly terminated. Arbitrator awarded the respondent be paid (i)TZS. 7,398,000/= as salary compensation for 18 months, (ii) TZS. 411,000/= as one month salary in

lieu of notice, (iii) TZS. 411,000/= as one-month annual leave pay, (iv) TZS. 663,923/= as Severance pay, (v) TZS. 31,615 salary for the worked days all total amounting to TZS. 8,915,538/=.

Applicant was aggrieved by the said award hence this application for revision. In the affidavit affirmed by Athuman Said, the principal officer of the applicant in support of the application the following grounds:-

- 1) That, honorable arbitrator grossly misdirected itself by the failure to carefully analyses and evaluate as well as accord due weight to the evidence adduced by the applicant; and*
- 2) That, the Commission awarded damages of TZS. 8,915,538/= erroneously as no such evidence was tendered to warrant grant of such quantum of damages, if any, or at all.*

On the date of hearing the application, Mr. Kabengwe Mathias, Advocate, appeared for the applicant, whereas Mr. Hemed Omari, Personal Representative, appeared for the respondent.

In support of the application, Mr. Mathias generally submitted on both grounds that, the arbitrator did not consider evidence of the applicant. Counsel for the applicant submitted that the respondent admitted that he was present at work and during strike. Counsel for the applicant went on that respondent did not prove that he did not participate in the strike. He further submitted that respondent and other employees were on strike on ground that, they were underpaid by the

applicant. Mr. Mathias concluded that the arbitrator awarded damages to the respondent without evidence.

On the other hand, Mr. Omari submitted that the arbitrator analyzed evidence of both sides. He dismissed the allegation that respondent participated in the strike at Administration Office arguing that respondent was at his Post Station hence, he did not participate in the alleged strike. Mr. Omari submitted further that; the chairperson of the disciplinary hearing found that there was no evidence against the respondent. He argued further that there were no valid reasons for termination and fair procedure of termination was not followed. He cited the case of ***Leopard Tours Ltd v. Rashid Juma & Another***, Revision No. 55 of 2013 HC, (unreported) to support his submissions that termination of employment is lawful if there is valid reason for termination and fair procedure for termination. Mr. Omari added that, the duty of proving fairness of termination lies on the employer and that applicant failed to discharge that duty. He maintained that there was no strike.

In rejoinder, Mr. Mathias maintained that respondent was present at work and participated in strike and that Procedures of termination were adhered to. He conceded that in the said strike, respondent and other employees were claiming their right.

I have carefully examined the CMA record to see whether termination of employment of the respondent was fair both substantively and procedurally. It was submitted by counsel for the applicant that the arbitrator did not analyze properly evidence in reaching the conclusion that termination of employment of the respondent was unfair. It is undisputed fact that reasons for termination of employment of the respondent was that respondent was found guilty of serious misconduct and dishonest due to failure to control and suppress illegal strike organized by his subordinates as contained in termination letter (exh. K-5). It was argued by counsel for the applicant that respondent participated in the alleged strike while counsel for the respondent submitted that he did not participate. It was also submitted by counsel for the applicant that respondent did not prove that he did not participate in the strike. I should point albeit briefly that applicant had the onus of proof that respondent participated in strike. It was not a duty of the respondent to prove that he did not participate in the strike.

I have examined evidence that was adduced at CMA on behalf of the applicant to see whether proved allegations that were levelled against the respondent to justify termination of his employment. In his evidence, Jacob Manyata Msuya (DW1) testified in part: -

"Tarehe 1/7/2019 wafanyakazi kitengo cha malalamikaji waligoma na kuandamana mpaka jengo la utumishi. Walikaa parking na baadaye tulimtafuta mlalamikaji atueleze kilichotokea. Mlalamikaji alisema wafanyakazi waligoma. Tulishangaa na kumuuliza mbona hakutoa taarifa ya maandalizi ya mgomo huo na kwa nini yeye pia aligoma..."

On the other hand, Ayub Philipo (DW2) testified as follows: -

"Tarehe 1/7/2019 ulitokea mkusanyiko wa watu waliofika eneo la mlalamikaji na kufika eneo la utawala. Lengo lao lilikuwa kudai stahiki zao kwa uongozi wa mlalamikiwa. Nami kama kiongozi wa ulinzi niliwasihi warudi eneo lao la kazi kwa sababu wote walihitaji kuonana na utawala. Walikuwa zaidi ya 20. Niliwashauri wateue uwakilishi ili waende kueleza jambo lao. Walifanya hivyo na wengine walirudi kazini. Niliwapeleka wawakilishi wao kwa HRO na sijui kilichoendelea huko. Nilifanya upelelezi nikabaini mlalamikaji na wenzake waliorganize mkusanyiko ule"

While under cross examination, DW2 testified:-

"Mlalamikaji hakuwemo kwenye mkusanyiko ule".

In his evidence, Nasibu Mkolele Juma (PW1) admitted that on the material date he was in office but did not admit to have participated in the alleged strike.

It is my considered view that respondent did not participate in the alleged strike. I have reached that conclusion after my careful examination of evidence of both DW1 and DW2 the only witnesses for the applicant. It is clear on the first place in the evidence of DW1 that, respondent was not among those who were on strike as a result, efforts were made to trace him and ask him to explain what transpired. It was

at that point the respondent informed DW1 that employees were on strike. In my view, respondent was charged simply because he did not give information to the management relating to the planned strike by his subordinates. Though DW1 testified that respondent participated in the alleged strike, DW2 testified that respondent did not participate. Therefore, there is contradiction in evidence of the applicant between DW1 and DW2 in relation to participation of the respondent in the alleged strike. This contradiction or inconsistency can only be resolved by considering evidence of the respondent who testified that he did not participate in the alleged strike. By the way, reading evidence of DW2, the said strike cannot be regarded as illegal. That said, I find that it was not proved that respondent participated in the alleged strike. This conclusion is also fortified by reasons for termination contained in termination letter (exh. K-5), suspension letter (exh. K-1) and the findings of the disciplinary hearing committee (exh. K-3) all tendered in evidence by the applicant. The suspension letter date 31st July 2019(exh. K-1) reads in part as follows: -

*"...You're alleged that on July 1, 2019 **you as a supervisor you failed to control and suppress illegal strike organized by your subordinates which affected the productivity and peaceful atmosphere at the company...**"*

On the other hand, the chairperson of the disciplinary hearing recorded in the disciplinary hearing Form (exh. K-3) as follows: -

"THERE EXIST A STRONG SUSPICION THOUGH NOT PROVED THAT THE ACCUSED WAS AWARE OF THE IMPENDING STRIKE BUT FAILED TO REPORT IT -THIS NEEDS FURTHER INVESTIGATION TO PROVE. THERE EXIST A SUSPICION THAT NO GOOD RELATIONSHIP OR BREAK OF COMMUNICATION BETWEEN THE SUPERVISOR AND SUBORDINATES SUCH THAT OTHER PERSONS TOOK THE OPPORTUNITY TO LEAD THE STRIKE...THE HEARING REACHES A DECISION THAT THE SUPERVISOR WAS NOT DIRECTLY INVOLVED IN THE STRIKE BUT WAS INFORMED AND FAILED TO PRESENT THE SITUATION AS CLEARLY AS REQUIRED – PRESENTED IT A BIT LATE (LACK OF COMMUNICATION)- THE HEARING LACKED EVIDENCE TO PROVE THAT THE SUPERVISOR HAD INFORMED MANAGEMENT ABOUT RINGLEADERS."

To the surprise, on 2nd September 2019, applicant served the respondent with termination letter (exh. K-5) on ground that the disciplinary hearing found him guilty of the misconduct charged. The said termination letter reads in part as follows: -

"...On August 19, 2019 you were issued with summons to attend the disciplinary hearing for alleged misconduct and dishonest due to failure to control and suppress illegal strike organized by your subordinates which affected the productivity and peaceful atmosphere of the company.

*Therefore, **you were found guilty of the allegations before the disciplinary hearing which was conducted on August 23, 2019...***

Due to such serious misconduct and dishonest, the Management has lost trust with you and has therefore decided to terminate your Employment Contract with effect from September 2, 2019..."

From where I am standing, the two exhibits are irreconcilable. In the disciplinary hearing there was no finding that respondent was found

guilty, rather that, there was suspicion that he was involved in strike and that investigation was required. But the conclusion in the termination letter (exh. K-5) was that the disciplinary hearing found the respondent guilty of the misconduct and dishonest. I therefore safely conclude that applicant did not prove that there was valid reason for termination of the respondent. Therefore, termination of employment of the respondent was substantively unfair. I associate myself with the holding in the case of **Leopard Tours LTD** (supra) that termination of employment is lawful if there is valid reason for termination and fair procedure for termination. Although the arbitrator did not analyzed evidence as I have done hereinabove, all the same, reached a similar conclusion that termination of employment of the respondent was substantively unfair. I therefore dismiss the first ground.

It was submitted by counsel for the applicant that the arbitrator awarded damages to the respondent without evidence. As pointed hereinabove, the Arbitrator awarded the respondent be paid (i)TZS. 7,398,000/= as salary compensation for 18 months, (ii) TZS. 411,000/= as one month salary in lieu of notice, (iii) TZS. 411,000/= as one-month annual leave pay, (iv) TZS. 663,923/= as Severance pay, (v) TZS. 31,615 salary for the worked days all total amounting to TZS. 8,915,538/= as he found that respondent was unfairly terminated. In his

evidence, respondent testified that his monthly salary was TZS. 411,000/= . This evidence was not rebutted by the applicant. Having found that termination of employment of the respondent was substantively unfair, in terms of section 40(1)(c), 41(5) and 42 of the Employment and Labour Relations Act [Cap. 366 R.E. 2019], the arbitrator was entitled to award the respondent the amount mentioned hereinabove.

For the foregoing, I hereby uphold the CMA award and dismiss the application for want of merit.

Dated at Dar es Salaam this 27th June 2022.



B. E. K. Mganga
JUDGE

Judgment delivered on this 27th June 2022 in the presence of Frank Pius Kamina, Advocate for the applicant but in the absence of the respondent.



B. E. K. Mganga
JUDGE

