

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

LABOUR REVISION NO. 435 OF 2021

*(From the decision of the Commission for Mediation and Arbitration of DSM at
Kinondoni) (Lucia: Arbitrator) dated 30th September 2021 in
Labour Dispute No. CMA/DSM/KIN/695/202)*

BETWEEN

HERITAGE ENGLISH MEDIUM SCHOOL.....APPLICANT

VERSUS

HAMISI MATIKO MUHURU.....RESPONDENT

JUDGEMENT

28th June 2022 & 19th July 2022

K. T. R. MTEULE, J.

Dissatisfied with the award of the Commission for Mediation and Arbitration [herein after to be referred to as CMA] the applicant **HERITAGE ENGLISH MEDIUM SCHOOL** has filed this application under the provisions of Rules 24 (1), (2) (a) (b) (c) (d) (e) (f), (3) (a) (b) (c) (d) and 28 (l) (c) (d) and (2) of the Labour Court Rules, GN. No. 106 of 2017 and Sections 91 (l) (a) (b), (2) (a) (b) (c), (4) (a) (b) and 94 (l) (b) (i) of the Employment and Labour Relations Act No. 6 [CAP 366 RE 2019] as amended from time to time [herein to be referred to as ELRA], praying for Orders:-

1. That this Honorable Court be pleased to revise, quash and ultimately set aside the award of the Commission for Mediation

and Arbitration Dar es salaam Zone in a Labour Dispute No. CMA/DSM/KIN/695/2020/284 by Hon Lucia Chrisantus Chacha.

A. the Arbitrator delivered on the 30th day of September 2021.

2. Any other relief this Court finds fit and just to grant.

The brief background of the dispute as gathered from the CMA record and the parties' pleadings is explained hereunder. The respondent was employed by the Applicant as a Driver since 1st June 2011. Their relationship turned hostile on 28th August 2020 when the respondent was terminated from the employment for an alleged misconduct where he was claimed to have used an abusive language and threats. Being aggrieved by the termination decision, the respondent filed the aforementioned Labour Dispute at the CMA on 03rd September 2020 claiming the Applicant to have the termination to have been made by the employer without a valid reason and procedure. At the CMA the arbitrator found that the termination was not fair in terms of procedure as the Applicant herein did not follow any procedure in terminating the Respondent. The Applicant was aggrieved by the CMA award, and this triggered this application.

The affidavit in support of this application is sworn by Mr. Josephat Mnaka who is the applicant's Principal Officer and on the other hand, the respondent filed his sworn counter affidavit. The affidavit

contained eight legal issues challenging the decision of the arbitrator.

These issues are:-

- (i) Whether, the commission impartially and correctly considered the entire evidence brought before it.
- (ii) Whether the commission considered the closing submissions filed by applicant.
- (iii) Whether arbitrator correctly awarded 12 months salaries per the tune of Tshs.3,960,000/=, Severance pay per the tune of 462,000/=, one month salary being the notice per the tune of Tshs.330,000/= and Certificate of Service to the Respondent.
- (iv) Whether the utterance of abusive language by the respondent to Mafanikio Francis Constitute Sufficient reasons for termination of employment.
- (v) Whether the arbitrator was justified to rule out that, for misconduct to exist there should be a guideline to that effect.
- (vi) Whether the fact that, the misconduct occurred during Saccos meeting exonerate the respondent from the rules of good conduct.
- (vii) Whether, despite all correspondence between the applicant and respondent, the arbitrator was justified to rule out that the respondent was terminated un-procedural.

(viii) Whether the arbitrator was justified to rely on respondent sole testimonies.

At the hearing the applicant was represented by Mr. Robert Jagadi Advocate while the respondent appeared in person. The matter was heard by oral submissions.

In his submissions, the Applicant's counsel Mr. Jagadi objected the CMA award asserting that it did not consider the evidence given.

According to the Applicant, the Respondent actually committed the alleged misconduct by giving abusive language and threat at the workplace which is prohibited by Rule 9(4) of the Employment and Labour Relations (Code of Good Practices) GN. No. 42 of 2007 where it is categorized as misconduct which can lead to termination of employment.

Mr. Jagadi submitted that the termination followed all legal procedures, hence it was lawful in the eyes of the law. He stated that a letter concerning the allegations was issued to the respondent who did not respond. In his view act of not responding by itself amounts to misconduct according to Rule 12 (3) (f) of GN. No. 42 of 2007.

Regarding procedure Mr. Jagadi argued that the respondent was called and given right to be heard in a disciplinary committee meeting which he attended and give a defence but was found guilty with the misconduct resulting to the termination of his employment.

Mr. Jagadi challenged the reasoning of the arbitrator that the applicant failed to submit the school regulation which prohibit abusive language which formed the basis of her decision. He submitted that the arbitrator misdirected herself, on the reason that abusive language is not only prohibited by school regulation but also by GN. No. 42 of 2007 at Rule 9 (4), therefore, disregarding the mentioned rules by holding that the applicant did not commit any offence amounts to closing eyes against Rule 9 (4) of GN. No. 42 of 2007.

Mr. Jagadi submitted that, in the CMA, the respondent did not bring any witness. In his view, it was not right to for the arbitrator to award him anything against the applicant by relying merely on the respondent's testimony without having any further evidence. He added that the respondent failed to bring any witness because he has several misconducts and not cooperative in the workplace.

Mr. Jagadi further added that the abusive language and threatening language was used by the respondent on SACCO's meeting and

among the words uttered included "mjinga, msenge" which are not acceptable in a civilized society like a school environment.

It was further submitted that the arbitrator was not right in awarding TZS. 3,960,000/= as a salary of 12 months, TZS 462,000/= as severance pay, one month salary being notice TZS 330,000/= except certificate of service, on the reason that all the procedure of termination were complied with. Therefore, the respondent should have been entitled to what he claimed due to misconduct.

Replying to the applicant's arguments, the Respondent submitted that the court should not take note of the letter which the applicant is claiming that he did not respond. He denied having ever refused to reply to such a letter neither to have uttered the words mentioned by the applicant's Counsel. He stated that in the disciplinary meeting there was no any witness who was called to prove the offences against him.

He asserted that there were employees who were claiming money from the SACCOS and what he remembers during the meeting is him asking about when the money will be paid to the members. In his view, it was the questioning about the money which led to a letter of accusation that he threatened the SACCOS's Chairperson Mr.

Mafanikio. He stated further that after replying, the second letter was issued alleging him to have given abusive language. He thus prayed for the application to be dismissed.

In rejoinder the applicant's Counsel reiterated his submission in chief but raised a concern about the Respondent raising new issues at the revisional stage. He mentioned the said new issues to include the aspect of witness and shares of the SACCOS.

In resolving this matter, I believe it is necessary for this Court to address the following issues:-

- i) Whether the applicant adduced good grounds for this Court to exercise its revisional power and set aside the CMA award.
- ii) Reliefs entitled to the parties.

In determining the first issue I will scrutinize the appropriateness of arbitrator's assessment on the fairness of termination. Fairness of termination is based on two aspects namely the fairness of reasons and the fairness of procedure. (See **Tanzania Revenue Authority V. Andrew Mapunda**, Labour Rev. No. 104 of 2014). In this case, it was held:-

"(i) It is the established principle that for the termination of employment to be considered fair it should be based on valid

reasons and fair procedure. In other words, there must be substantive fairness and procedural fairness of termination of employment, Section 37 (2) of the Act.

(ii) I have no doubt that the intention of the legislature is to require employers to terminate employees only basing on valid reasons and not their will or whims."

Furthermore, the issue of reason for termination is paramount under International Labour Standards. Article 4 of ILO Convention provides:-

"Article 4: The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or services."

Starting with the reason for termination, the applicant was terminated for allegedly committing a misconduct (use of abusive language and threatening) against the Chairman of the SACCOS as per Exhibit D1 collectively.

In ascertaining as to whether the arbitrator was right in his findings regarding reason for termination, I had to go through the CMA record

and the award. The record indicates that the respondent was charged with misconduct alleged to have been committed on 13th July 2020. (Exhibit P1 - respondent's charge sheet). It was so testified by DW4 at page 20 paragraph 2 of the CMA proceedings. It is undisputed that the meeting of the SACCOS took place on 13th July 2020 which was the day on which the misconduct is alleged to have been committed.

In attendance in that meeting were DW1, DW2 and DW3 who testified that the respondent committed the misconduct. DW1 stated generally that the Respondent made insults and threat without mentioning the actual words used in the alleged insults and threat. DW3 who is said to be the victim of the alleged insult stated that the Respondent called him "mjinga na atamfanyia kitu kibaya." The mediator was of the view that the words "mjinga" is not an insult but a person with no knowledge and interpreted the words "nitakufanya kitu kibaya" to be ambiguous and unclear as that "kitu kibaya" was not explained.

In this application, the applicant came out with new words of insult that is "mjinga, msenge". The word "msenge" was never mentioned in the CMA. It is appearing for the first time in this application. Although there are discrepancies between the evidence in the CMA and what is deponed in the affidavit, the Applicant, it is an

established principle that the standard of proof in the civil matters is on balance of probability. The arbitrator disregarded the words as not constituting insults. In my view, telling someone "mjinga" and "nitakufanya kitu kibaya" constitute abusive language and threat. What needs to be determined is the strength of the abusiveness and its sufficiency as a reason to terminate an employment contract.

Under Rule 11 of Guidelines for Disciplinary, Incapacity and Incompatibility Policy and Procedures of Employment and Labour Relations (Code of Good Practice) GN. No. 42 of 2007 the offences relating to behavior fall under category of serious misconduct. Abusive language in my view, falls under serious misconduct which may result to termination. Therefore, the misconducts committed by the respondent attracts termination as a proper sanction. The misconduct committed by the respondent is well provided under rules regulating employer employee relation hence the arbitrators' views concerning Applicant's failure to produce the policy clears the respondent from the misconduct is not valid. I differ with the arbitrator at this point and hold that there was a fair reason for the termination of the Respondent's employment.

Having found the reason for respondent's termination being valid and fair, the next question is on procedural aspect. In the CMA it was

found that the Respondent's termination was procedurally unfair on the following reason; first the SACCOS was not affiliated with the employer business, second the respondent was charged for other offences and lastly Exhibit D1(Minutes of Disciplinary Hearing) does not provide right to appeal to the respondent.

In addressing procedural aspect, the relevant provision is **Rule 13 of GN. 42 of 2007**. In the instant matter, the Respondent was charged with offences mentioned in the show cause letter for disciplinary hearing. On top of those offences, another offence termed negligence was added (**See Exhibit P1 - respondent's charge sheet**) to the **charge sheet**, while the show cause letter (Exhibit D1 collectively) demanded the applicant to give explanation on the offence of using abusive language and threatening. Furthermore, the notice to appear for disciplinary hearing did not state the alleged new offence, contrary to Rule 13 (2), (3) of the Code.

In case of **Abbas Sherally & another vs. Abdul S.H.M. Fazalboy**, Civil Application No. 33 of 2002, the Court held that:-

"The right of a party to be heard before adverse action or decision is taken against such a party has been stated and emphasized by the courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will

be nullified, even if the same decision would have been reached had the party been heard, because 15 the violation is considered to be a breach of natural justice".

"It has long been settled that a decision affecting the individuals rights which is arrived at by a procedure which offended against principles of natural justice, is outside jurisdiction of decision-making authority."

In our case, charging the Respondent with an offence which was not communicated to him by the notice issued prior to hearing, amounted to breach of principle of natural justice.

From the above authority, since the principles of natural justice were not adhered to by the applicant, then, I find no need to fault the arbitrators finding that the procedure was not fair. Therefore, it is my finding that the termination was substantively fair but procedurally unfair.

Having found that there was a valid reason for termination but with unfair procedure, the 1st Issue as to **whether the applicant adduce good grounds for this Court to exercise its revisional power and set aside the award** is answered affirmatively.

Regarding the reliefs entitled to the parties, unlike CMA I have found that the applicant had a valid reason to terminate the respondent. However, fair procedure was not observed. In the cases of **Salum Omary Mavunyira Vs. Director General of NHC** 2014 (2) LCCD No. 107; **Mohamed R. Mwenda & 5 Others Vs. Ultimate Security Ltd.**, Rev. No. 440/2013, **Deus Wambura Vs. Mtibwa Sugar Estates**, Rev. No. 03/2014; and Consolidated Revision No. 370 and 430 of 2013 between **Saganga Mussa Vs. Institute of Social Work** a principle has been laid as to what should be a relief in a case where only procedure was unfair. In the cited case the Court held:-

"Where there is a valid reason for termination but the procedures have not been complied with, then the remedy cannot be similar as in cases where both the termination was unfairly done substantively and procedurally."

Again, in the case of **Felician Rutwaza v. World Vision Tanzania**, Civil Appeal No. 213 of 2019, CAT at Bukoba (unreported), it was held:-

".....Under the circumstances, since the learned Judge found the reasons for the appellant's termination were valid and fair, she was right in exercising her discretion

*ordering lesser compensation than that awarded by the
CMA.....”*

In the strength of the above cited authorities, the twelve (12) months' salary compensation awarded by CMA are reduced to six (6) months' salary compensation. All other CMA reliefs are upheld except the compensation which is reduced to 6 months instead of 12 months. This application is therefore partly allowed.

Each party to the suit to take care of its own cost. It is so ordered.

Dated at Dar es Salaam this 19th day of July, 2022.



KATARINA REVOCATI MTEULE

JUDGE

19/07/2022