IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 32 OF 2022

(Arising from an Award issued on 8th December 2021 by Hon. Makanyaga A.A, Arbitrator in Labour dispute NO. CMA/DSM/ UBG/120/20/003/21 at Ubungo)

BETWEEN

SF ULINZI LIMITED ..... APPLICANT

AND

PAULO RUMASI SIRIYA ..... RESPONDENT

JUDGMENT

Date of Last Order: 13/06/2022
Date of Judgment: 01/07/2022

B.E.K. Mganga, J.

Facts of this application briefly are that on 1st May 2020, SF. Ulinzi Limited, the applicant, employed Paulo Rumas Siriya, the respondent, as a security guard. Respondent worked with the applicant until on 14th November 2020 when his employment was terminated on ground of misconduct. It was alleged by the applicant that on 02nd November 2020, respondent instigated and engaged in a strike contrary to the applicant's disciplinary policy. Aggrieved with termination, respondent referred Labour dispute No. CMA/DSM/ UBG/120/20/003/21 before the

Commission for Mediation and Arbitration henceforth CMA at Ubungo claiming to be paid TZS 4,265,625/= as compensation for unfair termination. Upon determination of the dispute, the Arbitrator found that termination of employment of the respondent was unfair and awarded the respondent to be paid one (1) month salary in lieu of notice and twelve (12) months' salary as compensation.

Aggrieved with the award, applicant filed this application imploring the court to revise and set aside the CMA award. In the affidavit sworn by Jackline Kitigati, the applicant's principal officer, raised seven (7) issues as follows: -

1. *Whether it was proper for the respondent to instigate strike among the workers and participated in illegal strike.*
2. *Whether it was fair for the arbitrator to assume facts during the hearing and make the decision based on the assumed facts contrary to the respondent's narration.*
3. *Whether unprocedural strike is a fair (good) reason for termination of employment contract.*
4. *Whether it was proper for the arbitrator to hold that the unprocedural strike is not enough reason for termination.*
5. *Whether unprocedural and instigation of strike is a serious misconduct warranting termination.*
6. *Whether it was proper for the Arbitrator to hold that there was delay of one month salary while the delay was for two (2) days.*
7. *Whether it was proper for the arbitrator to hold that there must be multiple misconducts before employment is terminated.*

In opposing the application, respondent filed his own counter affidavit.

In support of the application, Ms. Evangelina Ephraim argued the 1st, 2nd, 3rd, and 4th issues that Section 76(1) and (h) of Employment and Labour Relations Act [Cap. 366 R.E. 2007] prohibits strikes. she argued that in the application at hand, there was a strike of one day that occurred on 02nd November 2020. She submitted that the reason for the said strike was a delay of salary because employees including the respondent were supposed to be paid their salary on 30th October 2020, but they were not paid until when they went on strike. She submitted that despite the delay, they were later paid.

Counsel for the applicant submitted further that Respondent instigated strike without following procedures provided for under Section 80 and 83(1)(a) of Cap. 366 R.E. 2019. She argued that there is no evidence showing that prior the strike, respondent claimed either informally or formally about the delay of salary and that there was no notice of strike. Furthermore, respondent and all employees who participated in the strike being employed as security guards, signed the Code of Conduct requiring them not to go on strike. During her

submissions counsel for the applicant conceded that it was a dispute of interest in terms of Section 75 of Cap. 366 R.E. 2019 (supra). Ms. Ephraim criticized the arbitrator for disbelieving evidence of DW1 and DW2 without assigning reasons and that the arbitrator used extraneous matters not in evidence to make the decision.

On 5th issue, counsel for the applicant submitted that instigation of a strike is a serious misconduct warranting termination of employment of the respondent. counsel argued that the said strike was threatening the contract of the applicant and her customer because respondent was not willing to continue with employment while the rest continued with employment.

On the 6th issue, it was submitted on behalf of the applicant that arbitrator erred to hold that the delay of salary was for one month. Counsel conceded that the delayed salary was for the month of October. On the 7th Ms. Ephraim submitted that it is not a requirement of the law that for termination of employment there must be multiple of misconducts. Counsel for the applicant concluded her submissions by praying that the application be granted because there was valid reason for termination.

In opposing the application, Mr. Edward Simkoko, the personal representative of the respondent, submitted that Section 39 of Cap. 366 R.E. 2019(supra) provides that employer had a duty to prove fair reason for termination of which applicant failed to prove that respondent participated in illegal strike. To buttress his submission, he referred the Court to the case of ***Fredy Ngodoki v. Swissport Tanzania PLC***, Civil Appeal No. 232 of 2019 CAT (unreported). He firmly submitted that there is no evidence proving that respondent instigated strike. Mr. Simkoko submitted that there was delay of payment of salary.

In rejoinder Ms. Ephraim submitted that it was not in dispute that there was a strike. She insisted that in his notice to show cause respondent admitted that he was on strike.

Having cautiously gone through submissions of the parties and evidence in the CMA record, the main issue for determination is whether there was valid reason for termination of employment of the respondent. It was alleged that respondent participated in illegal strike and that that was the reason for termination of his employment. In terms of section 39 of Cap. 366 R.E. 2019(supra) applicant was duty to prove that termination of employment of the respondent was fair. Termination of employment can only be fair in terms of section 37(2)(a),

(b)(i), (ii) and (c) if there is fair reason and fair procedure of termination. In the application at hand, it was alleged that respondent instigated and participated in illegal strike. Therefore, applicant was under duty to prove that (i) there was illegal strike and (ii) that respondent participated in the said illegal strike. It is my view that applicant did not discharge that burden. My afore conclusion is backed up by evidence of both Godfrey Andrew Lukumbata (DW1) and Juvenale Edgar Kajoro (DW2) who testified that employees were demanding to be paid their salaries. In his evidence in chief, DW1 was recorded stating: -

> ***"...Tarehe 2/11/2020 nilikuta mkutano unaendelea saa 12 katika camp ya Ngerengere na mlalamikaji alikuwa akizungumzia mshahara kuchelewa..."***

While under cross examination, DW1 is recorded stating: -

> ***"...Kudai mishahara siyo kugoma lakini kitendo cha kuwaambia watu wasiende kazini ni mgomo na hawakwenda kazini..."***

On the other hand, DW2 while testifying in chief was recorded stating: -

> ***"...Kulikuwa na mgomo wakishinikiza kulipwa mishahara..."***

But while under cross examination, DW2 is recorded stating: -

"...Sikuwepo kwenye tukio la mgomo..."

On his side, Paulo Rumanus Sirya (PW1) while under cross examination testified that: -

"...Tulikuwa tunadai mishahara kwa kuwauliza viongozi. Mshahara ulichelewa kwa zaidi ya mwezi na siku..."

It is clear in my mind that evidence of DW2 is worthless because it is hearsay as she confirmed while under cross examination hence cannot be acted upon. On the other hand, demand to be paid salary cannot amount to strike illegal strike as admitted by DW1 while under cross examination. It is my view that there was no illegal strike but strike that is protected in law. It is not an illegal strike for employees to question their rights including payment of salary. There is no evidence in CMA record showing reasons as to why employees were not timely paid their salary. More so, there is no evidence showing that employees were notified that there will be delay of payment of salary and reasons thereof. It is my view, that employers cannot be allowed not to pay in time salaries of employees and go unquestioned. What has happened in the application at hand, by terminating the respondent, applicant was creating a threatening environment to her employees so that in future they should not question any delay payment of their salaries. In view, that cannot be allowed to happen. Employees have their right to be paid salary timely and if there is any delay, they must be notified.

It is my considered opinion that applicant had no valid reason for termination of employment of the respondent. I am of that strong opinion because, demanding or questioning for the delay of salary does not amount to illegal strike. Even if we assume that the respondent participated in strike, that strike was a lawful one. More so, section 83(2) of Cap. 366 R. E. 2019 (supra) prohibits employers to terminates employees who participates in lawful strike. This does not apply where employee involve themselves in misconduct such as violence and malicious damage to property as provided for under Rule 45(1) of GN. No. 42 of 2007 (supra) but no evidence was adduced by the applicant showing that respondent violated Rule 45(1) of GN. 42 of 2007 (supra). I associate myself with the holding in the South African case of ***Transport and Allied Workers Union of South Africa Obo Mw Ngedle and 93 others v Unitrans Fuel and Chemical (pty) limited,*** CCT 131/15 wherein it was held that participation in an unprotected strike does not automatically render dismissal substantively fair. The substantive fairness of the dismissal must be measured against *inter-alia* (i) serious of the contravention of the law, (ii) the attempt made to comply with the law and (iii) whether the strike was in response to unjustified conduct by the employer. In the application at

hand, it was unjustifiable for the applicant(employer) for delay to pay salaries to her employees, respondent inclusive and without notice or giving reasons for that delay. I further associate myself with the holding of my learned brothers in another South African case of ***NUMSA and Others v. CBI Electric African Cable*** [2014]1 BLLR 31 (LAC) wherein it was held that a judge who is called upon to determine fairness of a dismissal flowing from participation in an unprotected strike should consider the code which regulates dismissal for misconduct more generally, and determine *inter-alia* whether, the dismissal was an appropriate sanction or not. The court went on that, the illegality of the strike is not "**a magic wand which when raised renders the dismissal of strike fair**" (*National Union of Workers of SA v. VRN Steel* (1991) 12 ILJ 577 (LAC) the employer still bears the onus of prove that the dismissal is fair".

In the application at hand, it was alleged that respondent went contrary to the applicant's code of conduct that prevents employees to go on strike. It is my view that the said code should not be used as a stick to punish employees even when they have genuine demands. In the circumstances and facts of the application at hand, even if we assume that respondent participated in strike, in my view, dismissal was

not a proper sanction because employees were demanding to be paid their remuneration they have worked for. That said and done, I hereby uphold the CMA award that termination of employment of the respondent was unfair for want of reason and dismiss this application for want of merit.

Dated at Dar es Salaam this 1st July 2022.

B. E. K. Mganga
JUDGE

Judgment delivered on this 1st July 2022 in the presence of Evangelina Ephraim, Advocate for the applicant but in the absence of the respondent.

B. E. K. Mganga
JUDGE