IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

CONSOLIDATED REVISION APPLICATIONS NO. 290 AND 291 OF 2020

BETWEEN

PLATINUM CREDIT LIMITED ....APPLICANT/RESPONDENT

AND

JOSEPH ELIAS MASAGA..... RESPONDENT/RESPONDENT

JUDGMENT

Date of last order: 17/01/2022

Date of Judgment: 04/3/2022

B.E.K. Mganga, J

Joseph Elias Masaga, the respondent in revision application No. 290 of 2020, who is also the applicant in revision application No. 291 of 2020, was employed by Platinum Credit Limited, the applicant in revision application No. 290 of 2020 and respondent in revision application No. 291 of 2020 as branch Manager at Lindi Branch since 1st June 2015. Before his transfer to Lindi, Mr. Joseph Elias Masaga was holding the same position at Musoma branch. It happened that in September 2016, employment relationship between the two went sour because Platinum Credit Limited, (hereinafter referred to as the employer) served a letter to the said Joseph Elias Masaga, (hereinafter referred to as the

employee) containing allegations relating to absenteeism, gross insubordination, incompatibility and gross negligence. On 13th October 2016, the employee's employment was terminated. Aggrieved by the said termination, on 9th November 2016 the employee filed labour dispute No. CMA/DSM/KIN/R.1194/2016/44 claiming to be reinstated and compensation of not less than 36 months' salaries, payment of leave, repatriation costs, notice, subsistence allowance, severance pay and general damages. On 12th June 2020, Hon. Alfred Massay, arbitrator, having heard evidence of the parties, delivered an award that termination of employment of the employee was substantively fair but procedurally unfair. The arbitrator therefore awarded the employee to be paid TZS 6,000,000/= that is equivalent to four months' remuneration.

The employer was aggrieved by the said award, as a result, she filed revision application No. 290 of 2020 seeking the court to revise the said award. On the other hand, the employee was also aggrieved and filed revision application No. 291 of 2020. As the two application emanates from the same CMA proceedings and award, a consolidation order was issued, hence this consolidated judgment.

In support of revision application No. 290 of 2020, the employer filed an affidavit of Ladislaus Mwongerezi, her Human resources officer. In the said affidavit, the deponent advanced only a single issue to be determined by this court namely:-

> *"whether the applicant was under any legal obligation to supply investigation report of the misconducts to the employee/the respondent prior to the disciplinary hearing"*

The employee filed both the notice of opposition and a counter affidavit resisting the application. On the other hand, the employee filed revision application No. 291 of 2020. In the affidavit supporting the application, the employee raised two grounds namely:-

1. *Arbitrator erred in law and facts for considering that the reasons for termination were fair.*
2. *Arbitrator erred in law and fact for awarding four months' salary as compensation of unfair termination while admitting that termination of the employee was procedurally unfair.*

Parties preferred to argue this consolidated revision applications by way of written submissions. The employer enjoyed the services of Arnold Arnold Luoga advocate while the employee enjoyed the service of Michael Deogratias Mgombozi, a representative from Tanzania Union of Private Security Employees (TUPSE), a trade union.

In support of revision application No. 290 of 2020, Mr. Luoga, counsel for the employer, submitted that Rule 13(1) of the Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007 was complied with. Counsel for the employer submitted that, the cases of ***KBC (T) Ltd v. Dickson Mwinuka, High court Labour Revision No. 45 of 2013, Mwanza*** (unreported) and ***Sharifa Ahmed V. Tanzania Road Haulage (1980) Ltd, High Court labour Revision No. 299 of 2014,*** Dar es Salaam (unreported) relied on by the arbitrator emphasized that an employee is supposed to be given right to be heard. That, in the application at hand, the employee was afforded that right as evidenced by exhibit D5 and D6. Counsel for the employee concluded that termination was fair both substantively and procedurally and prayed the application be allowed by quashing and setting aside the award.

Mr. Mgombozi on behalf of the employee, resisting the application by the employer, submitted that arbitrator did not error as there was no proper investigation conducted in terms of Rule 13(1) and (5) of the Employment and Labour Relations (Code of Good Practice) Rules GN. No. 42 of 2007. Mr. Mgombozi, submitted that the disciplinary hearing form was not tendered.

I have considered the rival arguments by the parties which centers on whether procedure for termination of employment of the employee was adhered to or not. In the award, the arbitrator found that disciplinary hearing was conducted. The arbitrator found that investigation report was neither served to the employee nor tendered during disciplinary hearing. Having so found, the arbitrator held that, that was in violation of the law in terms of procedure because the employee was denied fair hearing.

I have read the provisions of Rule 13 of Employment and Labour Relations (Code of Good Practice) Rules GN. No. 42 of 2007 and find that there is neither requirement of serving the investigation report to the employee nor tendering it during disciplinary hearing. What the law requires is the employer to conduct investigation to find whether, there are grounds for a hearing to be conducted or not, as provided for under Rule 13(1) of GN. No. 42 of 2007(supra). In my view, the hearing referred to under this Rule, is disciplinary hearing referred to, in Rule 13(2) of GN. No. 42 of 2007 (supra). In short, investigation, is the first stage in termination procedures and the same is intended enable the employer to have an informed opinion before he/she decides to conduct a disciplinary hearing. In my view, based on the investigation report, an

employee must be notified the allegations he/she is facing and is entitled to reasonable time to prepare for hearing. I am of the view therefore, that the afore cited cases are not applicable in the circumstance of this application.

I have read the of Ladislaus Mwengerezi (DW1) and find that the employee was served with a show cause letter (Exh. D5) and denied the allegations levelled against him (exh D6). The employee was thereafter summoned to attend the disciplinary hearing (Exh. D7) which he attended accompanied by John Msonganzila, his representative as shown in the disciplinary hearing minutes (exh. D8). From what was testified by DW1, I am of the considered view that, the procedure was adhered to. I therefore allow this ground and revision No. 290 of 2020 filed by the employer.

As pointed hereinabove, theemployee was aggrieved by the award and preferred two grounds of revision. Submitting on the first ground, namely; that the arbitrator erred to hold that there was valid reason for termination, Mr. Mgombozi, the personal representative of the employee, submitted that the employer, did not prove that the reason for termination of the employee's employment was fair. Mr. Mgombozi submitted that, the employer framed unfounded charges against the

employee and that, there was unilateral action by the employer that amounted to constructive termination as employment was terminated without consultation. He argued that arbitrator did not consider evidence of the employee who testified that his employment initially was by verbal contract and that the same was entered in Musoma within Mara Region thereafter transferred to Lindi Region and that the employee had no record of disciplinary proceedings. Mr. Mgombozi cited Rule 12(2) of GN. No. 42 of 2007 (supra) and submitted that the first offence of an employee shall not justify termination unless the misconduct is so serious that it makes a continued employment relationship intolerable. Mr. Mgombozi submitted that, the allegation of insubordination was not proved.

On the second ground of revision namely; that the arbitrator erred in law and fact for awarding four months' salary as compensation of unfair termination while admitting that termination of the employee was procedurally unfair, Mr. Mgombozi submitted that, the arbitrator erred in holding that the employee was paid his rights including repatriation cost, substances allowance from the date of termination up to the date of payment. He went on that, arbitrator improperly exercised his discretion in awarding the employee to be paid only compensation for four months

instead of twelve months provided for, under section 40(1) of the Employment and Labour Relations Act [Cap. 366 R. E. 2019]. He argued further that, the employee was never paid in accordance with the law and that, arbitrator did not comply with mandatory provision of section 44 of Cap. 366 R. E. 2019 (supra). Mr. Mgombozi submitted that, the employee was entitled to be paid TZS 15,500,000/= as transport cost from Lindi to Musoma which is a place of recruitment. He submitted further that, the contract of employment was signed at Lindi while the employee was recruited in Musoma and prayed the employee be paid TZS 64,000,000/= as substance allowance, TZS 1,500,000/= as remuneration for the work done by the employee from 1st September 2016 to 13th October 2016 that is 21 days, TZS 1,000,000/= as payment for leave accrued to the employee and TZS 36,000,000/=as compensation for 36 months due to unfair termination amongst other prayers.

Mr. Luoga, counsel for the employer responding to the submission made on behalf of the employee, submitted that there was valid reason for termination and that it was proved that the employee was absent from work. Counsel for the employer relied on evidence Ms. Georgina Chilunda (Dw2), exhibits D3, D4, D5 and D7 and submitted that the

employee did not account for his whereabouts. Counsel for the employer submitted further that, the employee was incompatible as he accessed confidential email account of Ms. Georgina Chilunda (Dw2) and used abusive language to DW2 in presence of other staff members.

I should point here that counsel for the employer did not respond to ground two which relates to compensation the employee was entitled to.

I have carefully read the CMA record, evidence of the parties and submissions made thereto and find that some of the issues raised were neither part of the pleadings nor evidence at CMA. In his written submission, Mr. Mgombozi, personal representative of the employee, submitted that there was unilateral action by the employer that amounted to constructive termination as employment was terminated without consultation. I have examined the CMA record and find that nothing was either pleaded in CMA F1 or testified to, by Joseph Masaga (PW1), the employee relating to constructive termination. Therefore, this submission was made out of context and cannot be considered. The claim of TZS 15,500,000/= as transport cost from Lindi to Musoma, TZS 64,000,000/= as substance allowance, TZS 1,500,000/= as remuneration for the work done by the employee from 1st September

2016 to 13th October 2016 that is 21 days, TZS 36,000,000/=as compensation for 36 months due to unfair termination and TZS 1,000,000/= as payment for leave accrued to the employee is not in the evidence of the employee (PW1) though he indicated in the CMA F1 that he is claiming to be paid compensation of not less than 36 months' salaries, payment of leave, repatriation costs, notice, subsistence allowance, severance pay etc. In my view, it was not enough for the employee to mention in the CMA F1 without even showing the amount he was claiming. Worse, he said nothing in his testimony as what he was claiming and amount therefore. In other words, the aforementioned amount is from submission by the personal representative of the employee. That; in my considered opinion, cannot be regarded as evidence to be used by this court to revise the award issued by the arbitrator.

It was argued by Mr. Mgombozi on behalf of the employee that, there was no valid reason for termination, but Mr. Luoga counsel for the employer argued to the opposite. It was alleged as a ground of termination that the employee was absent from work without notice and that he committed gross insubordination, incompatibility, and gross negligence. In the award, the arbitrator found that it was proven by

evidence that the employee was absent from work for more than five days and that the same is aground for termination of employment. The conclusion reached by the arbitrator, in my view, is correct as the same is supported by evidence of Ladislaus Mwengerezi (DW1) who gave evidence that the employee was absent from work from 29th August 2016 to 3rd September 2016, 5th September 2016 to 14th September 2016. From 29th August 2016 to 3rd September 2016 is six days that is five working days; and from 5th September 2016 to 14th September 2016 is ten days but with eight working days. This evidence was not countered by the employee either in cross examination or at the time he was giving his evidence in chief. With that uncontradicted evidence, I hold as the arbitrator did, that the employee was absent from work for more than five days without notice. In terms of Guideline 9(1) of the schedule to the Employment and Labour Relations (Code of Good Practice) Rules GN. No. 42 of 2007, absent from work without permission or without acceptable reason for more than five working days constitutes serious misconduct leading to termination of employment.

It was further testified by DW1 that, the employee used abusive language to his co-employees and that he was warned to stop using

uncalled languages. DW1 tendered an email (exh. D9) to that effect. DW1 testified further that instead of stopping, the employee authored another email dated 24th August 2016 (exh. D10) with abusive language. DW1 testified further that, the employee failed to observe confidentiality as he accessed communications between the Management and another staff without prior authorization and disclosing that confidential information to staffs who were not privy to the said information. It is evidence of DW1 that, the employee accessed email account of the Georgina Chilunda who is employee of the respondent at Lindi Branch without authorization and divulged the information to other staffs. Reference was made to email printout exhibit D11. That evidence was not also contradicted. I have read the emails in question and find that, there was bad relationship between the employee and other staffs. In terms of section 32(2)(b)(i) of the Employment and Labour Relations Act [Cap. 366 R.E. 2019] and Rule 9(4)(c) of the Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007, conduct or compatibility of an employee is one of the grounds of termination of employment. In my view, and in the circumstances of the application at hand, the employer had valid reason for termination of employment of the employee. I therefore uphold the award that termination was fair substantively. The arbitrator held that termination was unfair

procedurally because investigation report was not served to the employee or tendered during disciplinary hearing. I have held hereinabove that, that conclusion or reasoning is not supported by a requirement of the law. I therefore revise the award and hold that termination was fair also procedurally.

The employee was awarded TZS 6,000,000/= as compensation for four months salary for unfair termination based on none-adherence to procedure of termination. The employee has brought the application challenging the said compensation alleging that it is contrary to the law and claiming to be paid more. As pointed hereinabove, the amount claimed in his written submission is not backed up with his evidence on record. On the contrary, it was testified by DW1 on behalf of the employer that the employee was paid repatriation cost to Mara and acknowledged receiving payment as evidenced by an email exhibit D12 that was admitted without objection. It is evidence of DW1 that the employee was paid through CRDB Bank and Barclays Bank. That evidence is unshaken. The claim by the employee therefore fails for two reasons (i) it was proved that he was paid and (ii) no justification for him to be paid because termination of his employment was both substantive and procedurally fair.

I should point out in a passing that, the employee was not supposed to be paid repatriation cost to Musoma because place of recruitment is Lindi according to the contract of employment dated 1st June 2015 (exhibit D1) that was entered between the employee and the employer. But, so long the parties agreed and the employer had paid, I will not make any order.

For all explained hereinabove, I allow revision application No. 290 of 2020 by revising the award and hold that termination of employment of the employee was fair both substantively and procedurally and set aside the order of paying the employee TZS 6,000,000/= as compensation for four months' salary. Having so held, I hereby dismiss revision application No. 291 of 2020 for lack of merit.

Dated at Dar es Salaam this 4th March 2022.

B.E.K. Mganga
JUDGE