

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

REVISION APPLICATION NO. 26 OF 2022

BETWEEN

PROSPER PAUL MALEWA APPLICANT

AND

**ULTIMATE SECURITY TANZANIA LTD &
GARDA WORLD COMPANY RESPONDENT**

JUDGMENT

*Date of last Order: 17/08/2022
Date of Judgment: 26/8/2022*

B. E. K. Mganga, J.

On 6th March 2017, the applicant and the respondent entered two years fixed term contract of employment. In the said two years fixed term contract, applicant was employed as a driver at monthly salary of TZS 160,000/=. It is said that applicant did not attend at work for more than five days consecutively. Based on that, on 14th February 2018, respondent served applicant with a termination letter with effect from 27th January 2018. In the said letter, respondent stated that reason for termination was absenteeism from 16th December 2017 to 15th January 2018.

Aggrieved with termination, on 13th March 2018, applicant filed labour dispute No. CMA/DSM/KIN/341/2021 before the Commission for Mediation and Arbitration (CMA) at Kinondoni claiming to be reinstatement without loss of remuneration on the ground that his termination was unfair both substantively and procedurally. At CMA, applicant's story was that for the days alleged that he was absent from work, he was on annual leave. On 21st December 2021, Hon. William, R, arbitrator, issued an award in favour of the respondent that termination was fair both substantively and procedurally.

Further aggrieved, applicant filed this application seeking the court to revise the said award. In the affidavit in support of the application, applicant raised Eleven (11) grounds but at the time of hearing, Mr. Mgombozi dropped some grounds and argued only Seven (7) grounds. The grounds that were argued by Mr. Mgombozi and responded by Mr. Philemon on behalf of the respondent are as follows: -

- 1. That the arbitrator erred in law and fact for failing to properly evaluate evidence adduced by the parties.*
- 2. That the arbitrator erred in law and facts for failure to consider evidence adduced by the applicant.*
- 3. That the arbitrator erred in law and facts for delivering an award that is not supported by evidence.*

4. *That the arbitrator erred in law and fact for not reinstating the applicant.*
5. *That the arbitrator erred in law and facts for failure to summarize, evaluate and record the key issues presented by the parties.*
6. *That the arbitrator erred in law for failure to give reasons for the decision.*
7. *That the arbitrator erred in law for issuing an award that is incompetent and incapable of determining rights of the applicant.*

When the application was called for hearing, Mr. Michael Mgombozi from TUPSE, a Trade Union, appeared and argued the application on behalf of the applicant while Elipidius Philemon, Advocate argued on behalf of the respondent.

Mr. Mgombozi opted to argue the grounds generally. It was submissions of Mr. Mgombozi that the arbitrator erred to dismiss the dispute filed by the applicant because respondent did not prove that the respondent committed the alleged misconduct of abscondment. He submitted that applicant went on leave after being permitted by the respondent. He went on that the arbitrator did not correctly interpret the provisions of section 16 of the Employment and Labour Relations Act [Cap. 366 R.E. 2019] that requires employer to put on the Notice Board rights of employees and that rights of the employees were not brought to their attention. Mr. Mgombozi submitted further that, in terms of Rule 14 of the

Employment and Labour Relations (General) Regulations, GN. No. 47 of 2017 the employer was under obligation to bring evidence showing the list of employees who went on leave. He argued further that on 01st December 2017 applicant signed a form for leave and letter praying to be allowed to go on leave (exh. A5) and that the same was granted. Mr. Mgombozi submitted that in his application for leave, applicant was praying leave from 16th December 2017 to 13th January 2018. He argued further applicant went on leave and was paid annual leave advance TZS 160,000/= and further that termination letter (Exhibit A4) proves that applicant went for leave. Mr. Mgombozi submitted that the charge that led to termination of employment of the applicant was that applicant absconded from 16th December 2017 to 15th January 2018. He went on that applicant reported back at work on 14th January 2018, as a result he was charged for abscondment.

Mr. Mgombozi argued that respondent was duty bound to prove that applicant prayed for leave but the prayer was rejected as a proof that he absconded. More so, he argued, leave roster was not tendered showing whether applicant was entitled for leave or not. He cited the case of ***Abdallah Kidunda & Another V. CM Co. Limited***, Revision No. 277 of

2013, HC (unreported) to support his arguments. He submitted further that section 31 of the Employment and Labour Relations Act [Cap. 366 RE. 2019], provides that employees have a right to go on leave and where leave is refused, the employer must inform the employee in writing, but this was not done by the respondent.

On procedure for termination, Mr. Mgombozi submitted that the disciplinary hearing committee was not properly constituted because persons who were supposed to permit the applicant to go on leave are the ones who set in the said disciplinary hearing and termination. He argued that that was contrary to Rule 13(4) of Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007. He went on that the said Rule provides that the chairperson of the disciplinary hearing must be impartial and cited the case of ***Huruma H. Kimambo V. Security Group (T) Ltd***, Revision No. 412 of 2016, HC (unreported) to support his submissions. He submitted further that the arbitrator did also not consider Rule 11 and 12 of GN. No. 42 of 2007(supra) because respondent was supposed to bring record of previous misconducts of the applicant. He added that Rule 9(3) of GN. No. 42 of 2007(supra) gives procedure for termination but the respondent did not adhere to that procedure. It was

submissions of Mr. Mgombozi on behalf of the applicant that no investigation report was tendered in evidence and that this was in violation of Rule 13 of GN. No. 42 of 2007(supra). Mr. Mgombozi summed his submissions by praying the application be allowed, CMA award be quashed and set aside.

Responding to submissions made on behalf of the applicant, Mr. Philemon, learned advocate for the respondent submitted that applicant was terminated due to absenteeism. He submitted that it was not disputed that applicant was not at work from 16th December 2017 to 15th January 2018. He submitted that applicant was not granted leave. He went on that section 31 of Cap. 366 RE. 2019(supra) provides how leave can be granted. He invited the court to read the said section together with item 10 of the contract of the parties. Mr. Philemon submitted that applicant was supposed to fill a form and the employer had an option as to when leave should be taken. Applicant filled the form (Exh. A5) but did not forward to the respondent because it was not filled on the part indicated "for official use only" hence it was not approved.

Counsel for the respondent countered the submissions that applicant was paid for annual leave arguing that the money paid to the applicant was not for annual leave, rather, it was advance salary as the respondent used to pay. Counsel argued further that the dates applicant was not at work are not 28 alleged that he was on leave.

Mr. Philemon submitted that it is not true that respondent did not prove abscondment of the applicant. He argued that the issue was whether, applicant was granted leave or not and argued that it was the duty of the applicant to prove that his leave was approved, and that duty was not on the respondent. He went on that section 31 Cap. 366. R.E.2019 (supra) does not provide that the employer shall give a letter to the employee after not approving leave application. He argued that the said Section only provides that the employer had a final say as to when employee should go on leave. He maintained that applicant did not follow procedure as a result the respondent was unaware that he applied for leave because the form did not reach the respondent.

On procedure for termination, Mr. Philemon submitted that persons who sat in the disciplinary hearing were not working in the applicant's

department. He submitted that the Disciplinary hearing minutes (Exh. D2) was also signed by the applicant. He went on that the chairperson of the disciplinary hearing committee was Jaffar Habib while the notice to the respondent to attend the disciplinary hearing was signed by a different person.

On failure to tender previous record of absenteeism, Mr. Philemon, learned counsel for the respondent submitted that it is not the requirement of the law that respondent was supposed to tender a record showing previous absenteeism. He maintained that Guideline 9 of GN. No. 42 of 2007(supra) provides that absenteeism for 5 days is sufficient for termination of employment. He therefore concluded that termination was fair both substantively and procedurally and prayed that the application be dismissed.

In rejoinder, Mr. Mgombozi submitted that Section 60(2) of Cap. 366 R.E. 2019(supra) provides that the employer had a burden of proof and not the employee and that respondent was duty bound to tender the roster showing as to when applicant was supposed to go on leave. During submissions, Mr. Mgombozi conceded that he was not sure whether

applicant made follow up to the respondent to see whether his application was approved or not. He conceded further that applicant had a duty to make follow up to see whether his leave was approved or not. Mr. Mgombozi reiterated that applicant was paid advance annual leave and not salary advance.

I have carefully considered rival arguments of the parties and find that the main issue is whether applicant was granted leave or not. I have examined evidence of the parties at CMA and find that leave was not granted. In short, applicant left his duty station for more than five (5) consecutive days without permission. This conclusion is supported by evidence of Shedrack Asher (DW1) who testified that applicant did not attend at work for more than five days and that when he came back, he failed to give valid explanation for his absence, as a result he was terminated. DW1 testified that application for leave was supposed to be approved by the immediate supervisor of the applicant and finally the respondent but this was not done. On the other hand, Paul Prosper Malewa (PW1), while under cross examination admitted that his application for leave was not approved because he simply filled the form for leave and left. With that evidence, in my view, applicant was absent from work for

the whole period stated in the termination letter without permission. I therefore conclude that termination of the applicant was substantively fair.

On procedural aspect of fairness of termination, it is undisputed that applicant was served with the charge, notice of disciplinary hearing and that disciplinary hearing was conducted. I have examined minutes of the disciplinary hearing (exh. D2) and find that respondent did not call witness or adduce evidence in support of the allegations against the respondent. the said exhibit D2 shows that applicant was asked questions to explain as to why he did not attend at work on the stated dates in the charge. In my view, respondent did not comply with the provisions of Rule 13(5) of GN. No. 42 of 2007(supra) that requires employer to adduced evidence in support of the charge against an employee. I therefore find that termination of employment of the applicant was procedurally unfair. It is undisputed that applicant's salary was TZS 160,000/= per month. Considering the nature of the misconduct namely absenteeism without justification, hence fair reason for termination, and guided by the decision of the court of Appeal in the case of [*Felician Rutwaza v. World Vision Tanzania*](#), Civil Appeal No. 213 of 2019 (unreported), I hereby order that

applicant be paid TZS 160,000/= equivalent to one months' salary as compensation for procedural unfair termination.

For the fore going, I allow the application to the extent explained.

Dated at Dar es Salaam this 26th August 2022.



B. E. K. Mganga
JUDGE

Judgment delivered on this 26th August 2022 in the presence of Prosper Malewa, the applicant and Elipidius Philemon, Advocate for the respondent.



B. E. K. Mganga
JUDGE