IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 189 OF 2022

(Originating from Labour Dispute No. CMA/DSM/TEM/326/2020/160/2020)

BETWEEN

SAID SALIM BAKHRESA CO. LTD. ..... APPLICANT

VERSUS

SAMIR SAID KHALFAN ..... RESPONDENT

JUDGMENT

S.M. MAGHIMBI, J:

The respondent Samir Said Khalfani was employed by the applicant Said Salim Bakhresa & Company Limited. He started as a storekeeper way back on 21/05/2001, he worked for one year and was then transferred to Weighing Division where he worked for two years till 2004 when he was re-designated to a dispatch clerk. In the year 2007, the terms of his contract changed to fixed term contract of three years renewable (EXP1). The last renewal of the contract was on 28/11/2019 for another three years (EXP2). Following allegations of misconduct of gross on the 20/06/2020, the respondent was suspended from employment to pave way for an investigation (EXD3). He was eventually terminated on 14/07/2020

(EXP4). Aggrieved by the termination, the respondent sought refuge at the Commission for Mediation and Arbitration for Ilala ("CMA") where he lodged a dispute No. CMA/DSM/TEM/326/2020/160/2020 ("the Dispute"). The award of the CMA was in favour of the respondent declaring the termination of his contract to be substantively unfair. The applicant was ordered to pay the respondent his salaries for the remaining period of the contract, one month salary in lieu of notice and gratuity. Aggrieved by the award, the applicant has knocked the doors of this court under the provisions of Section 91(1),(a),(b),91(2)(a),(b), 91,(4)(a),(b) and 94(1)(b)(i) of the Employment and Labour Relations Act 2004 as amended by Written Laws (Miscellaneous Amendments) Act No. 3 of 2010 and Rules 24(1), 24(2)(a),(b),(c),(d),(e) and (f) and 24(3)(a),(b),(c),(d),(e) and (f) and 24(3)(a),(b),(c),(d) and 28(1),(c),(d),(e) of the Labour Court Rules GN. No. 106/2007 raising the following legal:

1. Whether the CMA was correct in holding that the termination of the respondent was substantively unfair.
2. Whether the relief of 17 months compensation granted by the CMA to the respondent was legally justified in law.

On those two issues, the respondent moved this court to revise and set aside the arbitrator's proceedings and award in the dispute. She also prayed for any other relief that the court may deem just to grant. She was represented by Mr. Daibu Kambo, learned advocate. On his part, the respondent opposed the application by a Counter affidavit deponed by his advocate, Mr. Elibahati Akyoo. Hearing of the application proceeded by written submissions.

Starting with the first issue, whether the CMA was correct in holding that the termination of the respondent was substantively unfair, Mr. Kambo's submission was that the issue arose when the respondent reported that a Motor Vehicle with Registration No. T 969 CFR arrived in Dar es Salaam on 17th June 2020 while the applicant knew that the Motor Vehicle with Registration No. T 969 CFR on 17th June 2020 was not in Dar es Salaam. That the respondent was charged for giving false report on the date of arrival of the Motor Vehicle with Registration No. T 969 CFR and was invited for a disciplinary hearing where all his rights were given and he admitted to have reported a wrong date of arrival of the Motor Vehicle with Registration No. T 969 CFR to the applicant's yard.

He submitted further that the Respondent committed Gross Negligence of which he admitted before the disciplinary committee for failure to report to the management and to record the proper date on which the motor vehicle returned at Mzizima Yard. He argued that the claim against the respondent have basis under the law as it has been provided under Rule 12 (3) (a) and (d) of the Employment and Labour Relations (Code of Good Practice) Rules G.N No. 42 of 2007 ("the Code") which states the acts which may justify termination to include gross dishonesty and gross negligence. His argument was that the Respondent was aware of the transport operation and that of his work in general as he has been working from 2017 from the same department of transport as a dispatching officer, being the acting transport officer was never something new as he knew what he was doing.

He submitted further that the misconduct committed by the respondent was done dishonestly and for the purpose that he himself knew and the law does not tolerate the same as provided under Rule 12 (3) Code, because employment is built to the foundation of trust and confidence from both parties which the Respondent failed to honor the same.

He went on submitting that the Charges leveled against the respondent in this matter constitute a valid and fair reason(s) for his termination since they are directly reflected on Rule 12 (1) (a) and (b) (i)-(v), and Sub-Rule 3 of the Code. That the Respondent contravened the law which prohibits the acts of gross negligence and he knew that failure to report the appropriate record of the transport was wrong and on the disciplinary committee the Respondent never disputed that he did not report the required accurate information nor on the CMA. That he was aware of his conduct and he knew the standard of working to the applicant's company but due to negligence he decided otherwise contrary to the standards of the company and the only appropriate sanction was termination. He concluded that what the Respondent did is a very serious misconduct in any kind of employment relationship because any employment relationship is based on trust and confidence, the same has been stated in the case of MICHAEL ANDREW v. DOUGH WORKS, Revision No. 971 of 2019, HC Labour Division at Dar Es Salaam (Unreported) and the termination in accordance with Rule 12 (4) (a) of the Code hence the appropriate sanction to the respondent was to terminate his employment.

Unfortunately in his reply submissions, Mr. Akyoo concentrated much in replying to the affidavit in support of the application, something he could have done while filing his counter affidavit. I will therefore consider the submissions replying Mr. Kambo's submissions. His general reply submissions were that all the allegations were not proved anywhere, it was just a story which may be asserted by anybody else, therefore allegations like these before any judicial body cannot be taken to be a prudence evidence to have a validity of being evaluated. He pointed out that there is nowhere we can clearly extract the reason for the applicant terminating the employment service of the respondent because in looking to all of the evidence submitted before the CMA, there is no valid reasons adduced to justify the termination of the respondent's employment service hence the termination was unfair both on procedural and substantively, this is crystal clear, the respondent was terminated without valid reasons and no adherence to procedures,

On looking at the fairness of the procedures, Mr. Akyoo submitted that though this was not crucial as there is no logic to consider fairness of the procedures while there was no valid reasons in terminating the respondent's employment contract. That all in all there was no any

procedure followed by the applicant, because the respondent was not given the right to be heard under rule 4(2) of G.N No.42 dated 16th February, 2007 the Guidelines For Disciplinary, Incapacity And Compatibility Policy And Procedures. He argued the Rule 4(2) requires the chairperson of the hearing committee to be impartial and should not have been involved in the issue giving rise to the hearing.

He concluded that there is no doubt that the applicant terminated the employment service of the respondent without justifiable reasons , without being given the right to be heard and no any procedure was adhered to, therefore the intended revision has no chance to succeed. That this application is devoid of merit, baseless, vexatious and should be dismissed with costs.

Having considered the submissions of the parties, I have noted that there the alleged negligence against the respondent was not sufficiently proved. This is proved by the findings of the arbitrator at page 6 of the award where he held:

"Vilevile kwa kuzingatia matakwa ya kanuno ya 12(1)(a)&(b) ya G.N No. 42/2007, na kwa kuangalia ushahidi uliotolewa na pande zote unabainisha wazi kuwa uzembe unaodaiwa na mlalamikiwa kuwa

ulifanywa na mlalamikaji haukuwa uzembe bali ulichangiwa na ugeni wake na hata kutofahamishwa majukumu yake ya kazi katika kitengo hicho cha kupokea oda za safari za magari kwani pande zote wamekiri kuwa mlalamikjai alipewa kitengo hiko kwa muda baada ya aliyehusika na kitengo hiko alipokuwa mgonjwa hivyo ni wazi hakuwa na uzoefu wa kazi hizo. Vilevile ushahidi wa pande zote hauonyeshi endapo mlalamikaji alipatiwa mafunzo ya kufahamu majukumu yake hayo mapya na wala hakuna muongozo wowote uliowasilishwa mbele ya Time kuonyesha majukumu ya kazi za kitengo hiko na kuonesha kuwa mlalamikaji alifahamu muongozo huo au alipaswa kuufahamu lakini aliamua kwa makusudi kukiuka taratibu za muongozo huo"

From the wording above, the arbitrator held that the alleged negligence was not proved by the employer because the employer could not prove that the applicant was trained in that department. Therefore the issue to be determined by the court is whether under those circumstances, taking into consideration of the alleged misconduct, whether termination was the proper remedy. The arbitrator held that under the provisions of Rule 12(2) of the Code, termination was not the proper remedy considering

that the misconduct did not fall under those justifying termination under Rule 12(3) of the Code.

It was Mr. Kambo's submission that the Respondent was aware of his conduct and he knew the standard of working to the applicant's company but due to negligence he decided otherwise contrary to the standards of the company and the only appropriate sanction was termination. That what the Respondent did is a very serious misconduct in any kind of employment relationship because any employment relationship is based on trust and confidence, the same has been stated in the case of **Michael Andrew V. Dough Works, Revision No. 971 of 2019,** HC Labour Division at Dar Es Salaam (Unreported). He then argued that under Rule 12 (4) (a) of the Good, the appropriate sanction to the respondent was to terminate his employment for the serious misconduct he committed and the circumstances of the work itself and the existence of the likelihood of the repetition that will jeopardize the applicant's company. Therefore the respondent could not remain part of the employees.

As per the minutes of disciplinary hearing (Collective EXD4), the respondent admitted that he did not make follow up on the report that was sent by the GPRS person to see which routes the car took. However, in the

same meeting the respondent also admitted that he was not conversant with the position neither were there any skills. He however admitted not to make any follow ups on the report. There was also another witness the Ag. Transport Officer who made a testimony that the respondent entered some car information in the computer by listening to the driver and not by inspecting the car himself. There was also another witness the Department Manager who testified that the respondent did not feed the inspection data that day, rather it was someone else who was not so responsible for that job. Up until this point, there are testimonies of two witnesses which contradict. As held by the arbitrator, there was no proof that the misconduct of negligence was conducted and if so, there was no proof that the respondent was actually trained in that field to have known of the procedures. he was just filling n for a sick collague.

I have also noted another crucial issue, it would appear that the misconduct leveled against the respondent included some misconduct of other employees of the same company and according to the DW1, the respondent was suspended with several others. However, there was no evidence adduced on the destiny of the other employees who were suspended. The provisions of Rule 12(1) (b) (iv) of the Code are clear that

in deciding whether the termination for misconduct is unfair in the case that the rule or standard was contravened, the court should consider whether or not it has been consistently applied by the employer. The evidence is clear that there were other people whose conduct led to the respondent's termination but it has not been said what their fate was.

Further to the above, as held by the arbitrator, the important question to have considered, in case the misconduct was proved is whether the misconduct leveled against him justified termination. As per the evidence, the respondent was just holding an office for someone who was sick. Furthermore, there was report from the transport officer which showed that the car went out of the prescribed route, neither was there evidence to show that the car did actually go to Ruangwa. The DW1 had testified that the driver who deviated from the route confessed to have done so but neither in the disciplinary hearing nor at the CMA did this driver testify, therefore no proof of the allegation. As I also held above, there is no evidence to show that the provisions of Rule 12(1)(b)(iv) of the Code were complied with.

On the above findings, I concur with the findings of the arbitrator that the termination of the respondent was substantively unfair.

The next issue was on the reliefs that were awarded to the applicant, on this issue; the applicant is only challenging the award of 17 months' salaries of the remaining period of the contract and not the other compensation. I have noted that in his submissions to support the application, Mr. Kambo did not make any substantive submissions in this issue so he must have abandoned it, after all, I see that the respondent was awarded according to the law, because he was in a fixed term contract and he was awarded salaries for the remaining period of his contract. This issue also does not have merits.

All said and done, on the above findings, I see no reason to interfere with the award of the CMA. This applicant is hereby dismissed for want of merits.

Dated at Dar es Salaam this 27th day of October, 2022.

.....

S.M. MAGHIMBI
JUDGE