

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 14 OF 2023

(Arising from the decision of the Commission for Mediation and Arbitration of Dar es Salaam at Temeke, Labour Dispute No. CMA/DSM/TMK/220/2021/113/2023 by Hon. Mikidadi A. Arbitrator dated 24th November, 2022)

BETWEEN

JAMILA SHABANI RAMADHANI APPLICANT

VERSUS

ASA MICROFINANCE TANZANIA LIMITED RESPONDENT

JUDGEMENT

Date of last Order: 10/05/2023

Date of Judgement: 06/06/2023

MLYAMBINA, J.

The Applicant was not satisfied with the ex-parte Award of the Commission for Mediation and Arbitration (herein CMA) in the *Labour Dispute No. CMA/DSM/TMK/220/2021/113/2022* which favored the Respondent. He then asked this Court to examine its proceeding and setting aside its Award held by Hon. Mikidadi, A. (Arbitrator) dated 24th November 2022. It appeared that the Applicant was once employed by the Respondent under a fixed term contract of one year term. The contract started to run on August, 2019 and was supposed to end on August, 2021. She was terminated on 5th March, 2021. Before the CMA, the Applicant alleged for unfair termination, but the

Arbitrator held that the termination was substantially and procedurally fair.

Hence this application for revision on grounds that:

- 1. The Arbitrator erred in law and fact by holding that there were reasonable grounds for the Respondent to terminate the Applicant's employment contract.*
- 2. The Arbitrator erred in law and fact by holding that the Respondent followed the proper procedures in terminating the Applicant's employment contract.*
- 3. The Arbitrator erred in law and fact by holding that the consultation meetings minutes produced and admitted at the CMA as evidence was a proof of the existence of the meetings.*
- 4. The Arbitrator erred in law and fact by holding that the Applicant committed acts that the manner in which the Respondent dealt with the matter was justifiable and fair.*
- 5. The Arbitrator erred in law and fact by dismissing all the reliefs sought.*

The matter proceeded by way of written submission as consented by the parties on 25th April, 2023 but no rejoinder was filed. The Applicant was represented by the Learned Advocate Ms. Mary Ganga from Dirm Attorneys. The Respondent was represented by Counsel Zephania Paul.

In her submission, Ms. Ganga abandoned the third ground as indicated in the affidavit and remained with only four grounds. She argued the second and fourth grounds jointly.

On the first ground, Ms. Mary Ganga submitted that the Arbitrator misdirected herself by holding that the Applicant on her testimony did not deny allegations charged with nor explained if the allegations were proved during disciplinary hearing nor stated whether she was warned before. The Applicant testified that the reason was not fair to justify her termination as there was no investigation conducted.

Ms. Ganga continued to submit that; the show cause notice tendered (exhibit P3) contained five allegations while the summons letter for disciplinary hearing contained eight allegations (exhibit P4). In her view, the reasons were baseless since there was no investigation conducted.

Ms. Ganga added that; the matter was heard ex-parte and so the Respondent did not have a chance to prove reasons for termination to be fair contrary to *Section 37(2)(a) and (b) of the Employment and Labour Relations Act [Cap. 366 Revised Edition 2019] (herein ELRA)*

Ms. Ganga submitted the second and third grounds jointly that the Applicant was terminated for the reason of misconduct. She referred the case of **U.T.T. Project and Infrastructure Development PLC v. Yusuf Nassor**, Consolidated Revision No. 903 of 2019 (unreported) which laid down procedures to be followed on terminating the contract on account

of a misconduct. In the **U.T.T Project case** (supra) it was held that the termination must follow procedure as provided under *Rule 13 of the Employment and Labour Relations (Code of Good Practice) Rules, G.N. No. 42 of 2007*.

Ms. Ganga was of submission that the Applicant was terminated on unfounded charges without being afforded the right to be heard (exhibits P2 and P4). For her there was material breach of fundamental right of being heard. She cemented her point by referring the case of **MIC Tanzania Limited v. Ally Makongo** [2018] TZHCLD p.12 in which it was held that the termination of the Respondent was procedurally unfair since the charge consisted additional charges that were not alleged on the show cause notice.

She further added that; at CMA, the Applicant stated that at the disciplinary hearing no investigation was conducted and no any witness was called to prove the allegation of a misconduct. She added the act was contrary to *Section 37(2)(c) of ELRA*.

Again, on the fourth ground, Ms. Ganga submitted that; since the Arbitrator wrongly held that termination was fair and not entitled to any relief and following the injuries the Applicant had suffered, she is entitled to reliefs claimed at CMA. She cemented her point by referring to the case of **Said**

Hassan v. Hamson Tanzania Limited, Labour Revision No. 802 of 2018, High Court of Tanzania at Dar es Salaam, p. 8.

Against the application, the Respondent through her Representative Mr. Zephania Paul (Head of Legal & Compliance) submitted that the Applicants employment contract was terminated due to gross misconduct, fraud and misappropriation of money of the Respondent and her clients as it can be reviewed at page No. 57 of CMA F1.

Mr. Zephania continued to submit that; basing on the fact that the Applicant herself did not dispute the allegations at CMA as per pages 3 and 4 of the Awards, it amounted to reasonable grounds for termination of employment contract of the Applicant in accordance to *Rule 9(4)(a) and (c) and Rule 12(2)(a) both of G.N. No. 42 of 2007 and Section 37(2)(b)(i) of ELRA*. For him, the Applicant was terminated on fair reason related to gross misconduct of fraud and misappropriation of the Respondent's clients which justify for a good reason of termination.

On the second and third grounds, he submitted jointly that the Arbitrator was right to hold that the Respondent followed procedure on terminating the employment contract of the Applicant. He stated that even though the allegation found in exhibit P3 were 5 and those found in exhibit

P4 were 8, the Applicant was given more than 48 hours to prepare her defense as per *Rule 13 of G.N. No. 42 of 2007*. In his view, the Respondent followed lawful procedures to terminate the Applicant as stated in the Award at page 7 paragraph 1 and *Rule 8(1) of G.N. No. 42 of 2007* to cement on his point.

Mr. Zephania submitted that the referred case of **U.T.T. Project and Infrastructure Development PLC** (supra) by the Applicant is irrelevant to this case because in that case the employer did not comply with the procedure contrary to the case at hand. He then prayed for this Court not to consider that case.

On the fourth ground, Mr. Paul submitted that the Arbitrator was proper to dismiss reliefs prayed by the Applicant. He stated that by the time the Applicant was terminated, it remained only 5 months, so she was only entitled to pray for the remaining period of the contract and not 36 months compensation. In supporting such submission, he referred to the cases of **Bharya Engineering & Contracting Co. Ltd v. Pius Yuwangi**, Labour Revision No. 801 of 2019, High Court of Tanzania (unreported) and **Isaak Olutu v. CSI Electrical Limited**, Labour Revision No. 320 of 2019, High Court of Tanzania (unreported). He continued that the other reason for denial of Applicant's relief is that the Applicant combined two claims in CMA

F1 which are breach of contract and termination of employment by completing part B of the form which is an additional form for termination of employment contract dispute only. He supported his point by referring to cases of **Marian Boys School v. Rugaimukamu Rwekengo**, Labour Application No. 44 of 2022 and **Bosco Stephen v. Ngamba Secondary School**, Labour Revision No. 38 of 2017. He then prayed for this application to be dismissed.

The afore submission by the parties calls upon the Court to determine the following issues: *One*, whether there was reason for termination. *Two*, whether procedure for termination was followed. *Three*, to what reliefs are the parties entitled to.

It is the Court's findings that for determination of the termination of employment contract, there must be reason for termination, and the procedure has to be followed. This is in accordance to *Section 37(2) of ELRA* which states that: -

A termination of employment by an employer is unfair if the employer fails to prove-

- a) that the reason for the termination is valid;*
- b) that the reason is a fair reason-*

- i. *related to the employee's conduct, capacity or compatibility; or*
 - ii. *based on the operational requirements of the employer, and*
- c) *that the employment was terminated in accordance with a fair procedure.*

Rule 9(1) of the Employment and Labour Relations (Code of Good Practice) G.N. No. 42 of 2007 gives obligation to the employer to follow procedure for termination:

An employer shall follow a fair procedure before terminating an employee's employment which may depend to some extent on the kind of reasons given for such termination.

The above shows the onus on proving whether the termination was fair is to the employer as provided under *Section 39 of ERLA* which states that:

In any proceedings concerning unfair termination of an employee by an employer, the employer shall prove that the termination is fair.

The Applicant stated that there were neither reason for termination as no investigation was conducted to show the reason of her termination nor procedure was followed. As regards the issue of reason for termination, the

Respondent stated that the Applicant did not dispute on the allegation as it has been stated on page 3 and 4 of the Award.

As observed earlier, *Section 39 of ELRA* imposes a duty to the employer to prove that termination was fair. The Respondent, who is the employer, is seen in the record to be present through her representative Mr. Zephania Paul during the Mediation process but did not enter appearance to defend her case during Arbitration process. This shows the Respondent denied herself the right to prove her case.

On the other hand, the Award shows that the Arbitrator reached to the conclusion that there was reason for termination as the Applicant did not dispute the allegation. Here I defer with the Arbitrator's finding on reason for termination. The records which he took shows the Applicant disputed to the allegation. For easy of reference, the Applicant stated:

Katika kuachishwa kazi nilionewa maana sikutenda kosa na hata uchunguzi haukufanyika na katika kikao hapakuwa na mashahidi wowote.

The slight translation of the above evidence means termination was unfair because what was alleged was not true. The investigation did not take place and at the hearing there were no witnesses.

CMA records proves that there was no reason adduced to prove that termination was fair as the Arbitrator found. Also, the Applicant disputed the allegation which she was charged with.

On the aspect of procedure for termination, this can be seen with the naked eyes through exhibits P3 (show cause letter) which had five allegations and P4 (summons to appear for disciplinary hearing) which contained eight allegations. The procedure taken was contrary to *Rule 13(2) of the Employment and Labour Relations (Code of Good Practice) Rules, G.N. No. 42 of 2007* which states that:

*Where a hearing is to be held, the employer **shall** notify employee of the allegations using a form and language that employee can reasonably understand. [Emphasis is mine]*

Rule 13 (2) (supra) uses the word “shall” meaning the employer must comply with the procedure of notifying the employee of the allegations against him/her. Exhibit P3 is the form used to notify the Applicant of her allegations of which there were listed only five while in the disciplinary hearing as exhibit P4 show the Applicant was faced with eight charges.

Also, *Rule 13(1) of G.N. No. 42 of 2007 (supra)* provides for investigation to be conducted. For easy of reference, *Rule 13 (1) (supra)* provides:

*The employer **shall** conduct an investigation to ascertain whether there are grounds for a hearing to be held.
[Emphasis is mine]*

Again, the word "shall" have been used to mean investigation must be conducted. The Applicant stated that the investigation was not conducted. The Respondent was given time to defend her case but waived such right by not appearing at arbitration proceedings. This makes the Court believe that there was nothing for the Respondent (employer) to defend as investigation was not conducted. I therefore fault Arbitrator's findings on this matter too and find that the procedure for termination was not followed.

On the part of relief(s), this Court finds that the Applicant is entitled to the remaining period of contract which is five months, severance pay and certificate of service as termination was both substantially and procedurally unfair. On the issue of injuries suffered, the Applicant did not show how did she suffer to prove her allegation. I dismiss such complaint for lack of proof.

The Respondent in her reply submission raised the issue that the Applicant filled the CMA F1 on both sides of breach of contract and termination of employment. I find such issue to be an afterthought as the Respondent had room at CMA to raise the same issue. The Respondent

entered appearance during mediation period and decided to keep mum.
Therefore, I find her argument to have no legal legs to stand on.

Conclusively, I find this application to have merits. CMA Award is quashed and being set aside to the extent stated above. No order as to costs.



Y.J. MLYAMBINA

JUDGE

06/06/2023

Judgement pronounced and dated 6th June, 2023 in the absence of the Applicant and presence of Counsel Sophia Dawji holding brief of Zephania Paul for the Respondent.



Y.J. MLYAMBINA

JUDGE

06/06/2023

