IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 432 OF 2022

(Original from Labour Dispute No. CMA/PWN/KBH/7/22/2/2022)

SUNDA CHEMICAL FIBER LIMITED..... APPLICANT

VERSUS

JUDITH THADEY MROSSO..... ...RESPONDENT

CORRECTED EX PARTE JUDGEMENT

31/5-8/6/2023

OPIYO, J.

The application has been preferred under the provisions of Rule 91(1)(a),91(2)(a)(b)(c), 94(1)(b)(ii) of The Employment and Labour relations Act, Cap 366 RE 2019 read together with rule 24(1)(a)-(f), (3) (a)-(c), 28(1)(a),(b), (c),(d) (e) and 28 (2) of Labor Court Rules GN No. 106 of 2007. That applicant aim to move the court for the following praye*rs:* -

1. *Whether there was unfair termination by the Applicant herein.*
2. *Whether the Arbitrator properly analyzed evidence before the Commission.*

3. *Whether the Arbitrator was right in holding that there was breach of contract*
4. *Whether the Arbitrator was correct in law for deciding the dispute on the basis of the weaknesses in the defence case and not on the strength of the prosecution case.*

The application is supported by an affidavit sworn by Johan David Malima, the Human Resource Officer of the applicant. The matter proceeded *ex parte* after the applicant who was dully served through publication failed to appear and defend the application. In this application the applicant was represented by Kelvin Bakebula, learned counsel.

The brief facts of the matter are that the respondent was employed by the applicant as a chief cook for Chinese food since 2019. On 23/1/2022 she was terminated from employment. She filed the Labour Dispute to the CMA, No. CMA/PWN/KBH/7 for unfair termination. The matter was heard and ended in favour of the respondent. The CMA ordered for payment of five months salaries for breach of contract resulting to unfair termination. It is the finding of the CMA that the applicant had a reason for termination but the procedure was not followed. Applicant was dissatisfied leading to this application for revision on the above grounds.

In support of the application, Mr. Bakebula submitted that, the gist of dispute emanates from absenteeism of the respondent from work. On 22nd December, 2022 the respondent asked for sick leave in which she was to report back on 28th December, 2022 but she reported back on 14th January, 2023. After she delayed in reporting, Human Resource Officer called her and she was asked to explain her whereabouts for those 14 days without notice. She was served with suspension letter to give room for ascertaining the information she supplied to the employer that she was sick and given off duty for 14 days. That, the applicant officials went to the hospital which respondent named to be where she was treated. But the dispensary denied the medical chit she had submitted saying that excuse from duty cannot be given for 14 days consecutively they being a mere dispensary and not hospital. After the said verification was done she was consequently terminated.

He argued that the respondent failed to corroborate her statement of being absent for 14 days without proper permission as she failed to bring a key witness to corroborate her testimony. He drew attention of this court to the case of **Amina Ramadhani Vs. Staywell Apartment Ltd, Labour Rev. No. 461 OF 2016, High Court Labour Division TZHLCD 652/2022**

where it was held that absenteeism from work stands as a valid reason to terminate. He then argued that in our case, it stands as such since the applicant failed to provide supportive evidence for her absence.

He continued that the above case was cited with approval in the case of **Fortunatus Clavery Magai Vs. AME Security Ltd. Labour Revision No. 109/2019 High Court Mwanza** (unreported) concerning issue of absenteeism, in which the court said that absence from work for 5 days consecutively without justification constitutes serious misconduct that makes employment relationship intolerable as per rule 12(2) of GN 42 of 2007. And that the Seriousness of the absenteeism depends on the nature of respondent's work. Therefore, in this case where the respondent was employed as a cook, her absenteeism from work for 14 days consecutively makes her absence intolerable. In the case at hand the respondent failed to corroborate her absence for 14 days without permission that justified termination as applicant did.

He continued to argue that before she was terminated the applicant gave her a room for discussion on her absence for 14 days, but she refused as per page 4 of CMA award.

His further argument is that in the CMA the respondent claimed for unfair termination but in the award the arbitrator decided matter basing on breach of contract, something that was not pleaded in application form (see pg 13-14 of typed award). Therefore, since the court cannot grant prayers that have not been pleaded the applicant faults the arbitrator for deciding on issue that was not on his table. He thus, prayed for the court to set quash and set aside the award.

I have gone through the records of the CMA and this Court duly considered the submissions of the applicant's counsel. The issue for determination is whether the respondent was fairly terminated. On the first issue whether there was unfair termination the following is observed; the unfairness of the termination can be both substantively and procedurally. Substantively is when there is no reason for termination. The CMA award shows that substantively termination was fair in that the applicant had a reason for terminating the respondent. It only found some procedural lapses that led the arbitrator to hold that the termination was unfair. The fact that there was an unexplained absenteeism that exceeded 5 days the determination of the reasons for termination may not be the issue to detain us. In the case of **Athumani Bakari Milanzi Vs. City Garden Restaurant**, Labour

Revision No. 117 of 2011, the Labour Division it was held that absence form work without acceptable reason up to 5 working days does not justify termination. In that case, an employee may just be given warnings only, whereas, if the absence is for more than 5 working days, the employee may be terminated.

It is not in dispute that the respondent absconded from work for more than 5 consecutive days from when her leave ended on 30th December 2022 without notice. It was for her to prove otherwise to justify her absence, but she did not. She just insisted that she was sick as per the medical chit she had submitted, for which authenticity was put in question. She did not take trouble to notify the employer about her sickness for all that long or try to disapprove the presented finding by the employer that upon visiting the alleged dispensary where she stated to have been treated they found that the medical chits she presented were not genuine. Therefore, by applicant proving the respondent was absent from work for more than five days, I am in agreement with the finding by CMA that the applicant had a fair reason for respondent's termination. It is the finding of this court that the applicant indeed did not establish her reasons for absence from work from 1st to 10th January 2022 when she reported to work. Therefore,

absenteeism stands here as a valid reason to terminate the applicant as the applicant failed to provide sufficient evidence for her absence from work. That means determination of fairness of termination substantively was in favour of the applicant.

So in determining the first ground I am not going to dwell on determining substantive fairness of the termination but only procedurally. The applicant's submission concentrated in challenging substantive unfairness which however ended in her favour as we noted above, he is not expected to challenge it. Since the one in whose disfavor it ended did not prefer any revision I will save my strength in not dealing with it. The issue that remains is if there was procedurally unfair termination.

In compliance with procedures in termination, I am in agreement with the CMA in that the applicant failed to comply with all aspects of procedures in terminating the applicant. It is on record that after the applicant reported to work on 10th January, 2022 she was served with suspension letter to pave way for investigation. The applicant stated that they investigated the matter to the extent of visiting the dispensary where the respondent

possibly went for treatment, but the dispensary denied ever issuing respondent with a 13 days ED she was claiming to have.

Upon the respondent reporting back to work after suspension, she was availed with termination letter allegedly as a result of the investigation. She was not given the right to be heard before termination as no disciplinary committee proceedings was ever held to discuss the matter after the alleged investigation. This falls short of basic fair hearing in eyes of the law as the termination was arbitrarily and unilaterally made by the applicant. For this, the case of **NBC Ltd Mwanza Vs. Justa Kyaruzi**, Labour Revision No. 207/2008 cited by the arbitrator at Pg. 13 of the award is noted with approved. In that case it was held that;

> *"What is important is not application of the code in checklist fashion, rather to ensure that the process used adhered to basis of fair hearing in the labour context depending on circumstances of the parties, so as to ensure the act to terminate is not reached arbitrarily"*

The procedures for termination is well set under Section 41, 42, 43, of Employment and Labour Relations Act, Cap 366 RE 2019. The applicant did not attempt even to show how she complied with the above procedures.

No wonder that is the reason Mr. Bakebula never bothered to submit much on this, in vouch to prove their compliance with the law stipulated above. It is therefore vivid that CMA was right to hold that there was unfair termination due to the above procedural lapses.

What can be concluded is that the unfairness is on procedural not substantive requirements. The CMA had awarded the respondent the compensation of five months' salary. It is my view that, there being only procedural unfairness but having all the fair reasons for termination five months' salary as compensation is on the higher side. This is because; from the circumstances of this case the respondent proved to be obdurate and did not show any cooperation in trying to mitigate the effect of her absence from work without notice. In a way she played a big role in pushing the applicant to failure to follow all steps in terminating her after finding the reason to do so. For the reasons the five months compensation is reduced to three months' Salary compensation. This practice is derived from the wisdom in the holding in the case of **Felician Rutwaza Vs. World Vision Tanzania** Civil Appeal No. 213 of 2019, CAT at Bukoba at pages 15-16

"In the context of the case in which the unfairness of the termination was on procedure only, guided by some decisions of that court, the learned Judge reduced compensation from 12 to 3 months. With respect we agree with her entirely... under the circumstances, since the learned Judge found the reasons for the appellant's termination were valid and fair, she was right in exercising her discretion ordering lesser compensation that awarded was by the CMA. We sustain that award.

For the above-stated reasons, I only partly revise the CMA award to the extent of reducing compensation from five months' salaries to three months' salaries. The decision of the Arbitrator that the termination of the applicant employment was substantively fair but procedurally unfair is upheld.

Application partly allowed to the extent explained.

MAHAKAMA KUU YA TANZANIA (The High Court of Tanzania) DIVISHENI YA MAHAKAMA YA KAZI (Labour Division)

M. P. OPIYO,

JUDGE

8/6/2023