

IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 190 OF 2023

(Arising from an Award issued on 10/07/2023 by Hon. William, R, Arbitrator, in Labour Complaint No. CMA/DSM/KIN/491/2021/2021 at Kinondoni)

RICHARD MOSES MTABAGI APPLICANT

VERSUS

KNIGHT SUPPORT (T) LIMITED RESPONDENT

JUDGMENT

*Date of last Order: 25/09/2023
Date of judgment: 06/10/2023*

B. E. K. Mganga, J.

Facts of this application are that, on 6th March 2014, Knight Support (T) Limited the herein respondent entered unspecified period contract of employment with Richard Moses Mtabagi, the herein applicant. On 18th October 2021, respondent served that the applicant with a notice to attend disciplinary hearing alleging that applicant committed the misconduct namely absenteeism for five days from 5th October to 11th October 2022 without permission. It is undisputed that

on 1st November 2021, respondent terminated employment of the applicant due to absenteeism.

Applicant was aggrieved with termination of his employment, as a result, on 29th November 2021, he filed Labour dispute No. CMA/DSM/KI/491/2021/192/2021 before the Commission for Mediation and Arbitration (CMA) complaining that respondent unfairly terminated his employment. In the Referral Form(CMA F1), applicant indicated that he was claiming to be paid TZS 410,000/= being one month salary in lieu of Notice, TZS 410,000/= being payment for accrued leave, TZS 883,077/= being severance pay, TZS 6,560,000/= being salary arrears from June 2020 to October 2021, TZS 4,920,000/= being 12 month's salary compensation for unfair termination and be issued with certificate of service. In the said CMA F1, applicant also indicated that reason for termination was not justified and that procedures were not followed.

On 10th July 2023, Hon. William R, Arbitrator, having heard evidence of the parties, issued and award that termination was fair both substantively and procedurally. The arbitrator also found that applicant did not prove claims for salary arrears. The Hon. Arbitrator found that applicant was not paid salary for the last month he worked with the

respondent. In final analysis, arbitrator awarded applicant to be paid TZS 700,000/=only.

Further aggrieved, applicant filed this application beseeching the court to revise the said award. In support of the Notice of Application, applicant filed his affidavit containing three issues namely: -

- 1. Whether by relying on exhibit D5, Hon. Arbitrator was justified to hold that termination was fair.*
- 2. Whether it was proper for the arbitrator to rely on exhibits D5 and D6 and hold that admitted to have committed the alleged misconduct and that respondent was not required to follow procedures for termination.*
- 3. Whether arbitrator was justified to rely on exhibits D3, D4, D5, D6 and D7 to hold that procedures for termination were complied with.*

Respondent resisted the application by filing the Notice of Opposition and the counter affidavit affirmed by Fikiri Mzeru, her Human Resources officer.

When the application was called on for hearing, Mr. Hamza Rajabu, Personal Representative appeared and argued for and on behalf of the applicant while Mr. Davis Majige Vedastus, Advocate, appeared and argued for and on behalf of the respondent.

At the time of hearing the application, Mr. Rajabu abandoned the 2nd and 3rd issues and argued only the 1st issue. It was submitted by the personal representative of the applicant that, the arbitrator erred to hold

that respondent had a valid reason for termination and that procedures were adhered to. He submitted further that the disciplinary hearing did not recommend termination rather, ordered applicant to write an apology letter and applicant complied. He went on that, termination of employment of the applicant by the respondent amounted to double jeopardy. To support his submissions, the personal representative cited the case of ***Charles Mwita Siaga v. National Microfinance Bank PLC***, Civil Appeal No. 112 of 2017, CAT (unreported). He briefly submitted that procedures for termination were not adhered to and prayed the court to allow the application by revising the CMA award.

Resisting the application, Mr. Vedastus, advocate for the respondent submitted that respondent had a valid reason for termination because applicant committed a misconduct of absenteeism and that respondent proved fairness of reason. Counsel for the respondent submitted further that applicant attended hearing before the disciplinary hearing committee which recommended that he should right an apology letter and continue with his employment. He submitted further that ***Siaga's case*** (supra) does not apply in the circumstances of the application at hand. He concluded that respondent had valid

reason for termination and that procedures were followed and prayed the court to dismiss the application.

In rejoinder, Mr. Rajabu submitted that, before the disciplinary hearing committee, applicant gave justification for his absence at work as a result, the committee recommended that applicant should write an apology letter.

I have examined the CMA record and find that; it is undisputed by the parties that applicant did not attend at work from 5th October 2021 to 11th October 2021. The evidence of Fikiri Albert Mzeru (DW1) and that of Richard Moses Mtabagi (PW1) applicant is loud and clear to that effect. In his evidence, DW1 stated that did not attend at work for more than five days without permission from the employer namely the respondent. In his evidence in chief, applicant (PW1) stated that he notified the respondent that he did not attend at work because he was nursing his sick wife and that he also fell sick. I should point out that in his evidence, applicant did not tender any medical record to prove that he was sick. More so, DW1 was not cross examined on the issue relating to notification or reason for applicant's absence from duty for those days. I have read a letter dated 18th October 2021(exhibit D3) that applicant wrote to the respondent when he was served with the notice

to show cause and find that he admitted that he did not attend at work for five days. Exhibit D3 reads in part: -

"...

YAH: KUTOFIKA KAZINI KWA MUDA WA SIKU 5

...

Ni kweli sikufika kazini kwa muda huo kutokana na matatizo niliyokuwa nayo ya kuuguza mke wangu na mimi mwenyewe..."

But in his evidence, applicant stated that he did not attend at work for those days because he was nursing his wife and had no money inter-alia for fare because he was claiming salaries from June 2020 to October 2021. It is my view that evidence of the applicant especially reasons for his absence are not reliable. The claims of salary claims were not proved as was corrected held by the arbitrator and not proof that applicant notified the respondent reasons for his absence from work. More so, there is no evidence to show that respondent permitted applicant not to attend at work for those days. It is undisputed that, the reason for termination of applicant's employment is absenteeism. The termination letter (exhibit D7) is clear as it reads in part: -

"...This is to inform you that, as you have breached section 'c' of the company disciplinary code by not attending on duty for more than five days consecutively from 05/10/2021 to 11/10/2021 without permission of the employer and remain silent all this time until you appeared on 18/10/2021, this means you have decided to quit your employment as a security guard ..."

I therefore agree with the arbitrator that respondent had valid reason to terminate employment of the applicant. In short termination was substantively fair.

On fairness of procedure, it was evidence of the applicant (PW1) that he was terminated without being afforded right to heard. The CMA record shows that on 18th October 2021, applicant was served with the notice to show cause as a result he wrote exhibit D3 admitting his absence from duty for more than five days. After serving the respondent with exhibit D3, on the same date namely 18th October 2021, applicant was served with the notice to attend the disciplinary hearing on 22nd October 2021. The disciplinary hearing form (exhibit D5) shows that disciplinary hearing was conducted on 22nd October 2021 and applicant attended. The hearing form (exhibit D5) shows that during hearing applicant admitted to have been absent for more than five days without permission. Exhibit D5 reads in part: -

"... KSG5864 RICHARD MOSES MTABAGI anakiri kuwa ni kweli hakufika kazini kuanzia tarehe 5/10/2021 kwa sababu ya kuchelewa mshahara na niliuguliwa na mke wangu.

Maswali na majibu

Swali: 1. Ulitoa taarifa kwa viongozi kwa kuomba PA au udhuru kwamba huji kazini.

Jibu: Hapana.

...."

It is my considered opinion that applicant attended the disciplinary hearing. I have carefully examined the hearing form (exhibit D5) and found that during hearing, the respondent called first applicant to prove his innocence before applicant to call her witnesses. It is my view that, respondent was supposed to call her witness to prove the allegation and thereafter call applicant to defend himself. In fact, respondent did not call any witness to testify before the disciplinary hearing committee. The hearing form (exhibit D5) shows that, the disciplinary hearing committee just relied on the report by Valerian, the immediate boss of the applicant but the said Valerian was not called to testify. In my view, the procedure adopted by the respondent violated the provisions of Guideline 4(6) of the Guidelines for Disciplinary, Incapacity and Incompatibility Policy and Procedures issued under the Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007. Guideline 4(6) of GN. 42 of 2007 (supra) provides: -

"4(6) A management representative should present the case in support of the allegations against the employee and the employee should be given an opportunity to respond to the allegations at the hearing the parties shall have the right to call witnesses and question any witnesses called by the other party."

In the application at hand, the above quoted guideline was violated hence applicant was denied right to be heard properly. For the

foregoing, I hold that termination was unfair procedurally. I therefore revise the CMA award to that extent.

I have held hereinabove that termination of employment of the applicant was substantively fair but procedurally unfair. Applicant prayed to be paid 12 months salary compensations. In my view and guided by what was held by the Court of Appeal in the case of [Felician Rutwaza vs World Vision Tanzania](#) (Civil Appeal 213 of 2019) [2021] TZCA 2 that when termination is fair substantively but only unfair procedurally, the arbitrator or the court may award the employee below the minimum period of 12 months salaries provided under section 40(1)(c) of the Employment and Labour Relations Act[Cap. 366 R.E. 2019], I hereby award applicant to be paid four(4) months' salary compensation for procedural unfair termination. In his evidence, applicant (PW1) stated that his monthly salary was TZS 410,000/= and that in January 2021 agreed with the respondent to reduce that salary to 350,000/= for the period of six months only because the respondent was facing economic difficulties (exhibit P1). That evidence was not challenged by the respondent and there is no evidence that after June 2021, the said agreement was renewed to be operational beyond that period. Since evidence is wanting, I hold that, at the time of termination of

employment of the applicant, his monthly salary was TZS 410, 000/= . I therefore award applicant to be paid TZS 1,640,000/= being four months salary compensation for procedural unfair termination.

Dated at Dar es Salaam on this 06th October, 2023.



B. E. K. Mganga
JUDGE

Judgment delivered on this 06th October 2023 in chambers in the presence of Richard Moses Mtabagi, the Applicant and Fikiri Mzeru, the Human Resources Officer of the Respondent.



B. E. K. Mganga
JUDGE