

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

REVISION NO. 224 OF 2023

BETWEEN

ESEKO MAFURU APPLICANT

VERSUS

YARA TANZANIA LIMITED RESPONDENT

JUDGEMENT

Date of last Order: *11/12/2023*

Date of Judgement: *15/12/2023*

MLYAMBINA, J.

The Applicant filed the present application for revision of the Award. The record shows that the Applicant was employed by the Respondent from 01/03/2016 on a permanent base contract in the position of Dispatch & Stock Coordinator. It is alleged that; on 20/09/2019, the Applicant was promoted to the position of Dispatch and Stock Specialist. On 04/09/2020, the Applicant was terminated from employment on the ground of gross negligence.

Aggrieved by the termination, the Applicant referred the matter to the Commission for Mediation and Arbitration (herein CMA) claiming for unfair termination both substantively and procedurally. Upon consideration of the parties' evidence, the CMA found that the

Respondent proved the reason for termination, however, the procedures for termination were not followed. Therefore, in reliance to the case of **Felician Rutwaza v. World Vision Tanzania**, Civil Appeal No. 213 of 2019 and the case of **Veneranda Maro & Another v. Arusha International Conference Center**, Civil Appeal No. 322 of 2020, the Arbitrator awarded the Applicant a total of TZS 13,459,236/= as four months salary as compensation of the alleged termination.

Again, being dissatisfied by the CMA's decision, the Applicant filed the present application seeking for resolving of the following issues:

- i. Whether the CMA properly considered and analyzed the reason(s) for termination of the Applicant from service of employment and further whether the Respondent's case on reason(s) for termination was proved at a standard required in law.
- ii. Whether the Arbitrator properly analyzed the evidence on record on the Applicant's evidence for non-liability on gross negligence or acts.
- iii. Whether the CMA proceedings and Award issued on 25th day of August, 2023, before hon Nyang'uye H. A in *Dispute No.*

CMA/DSM/TEM/72/2021/43/2021 is partly tainted with material illegalities and irregularities warranting this Court to revise partly the Award and set it aside.

The application proceeded by way of written submissions. Before the Court, the Applicant enjoyed the services of Mr. Mafuru Mafuru, learned Counsel. Whereas, Mr. Nuhu Mkumbukwa, learned Counsel represented the Respondent.

I appreciate the comprehensive submissions of both parties which shall be taken on board in due course of constructing this judgement. After considering the parties rival submissions, CMA and Court records as well as relevant laws, I find the Court is called upon to determine the following issues: *One, whether the Respondent proved the misconduct levelled against the Applicant. Two, whether the Arbitrator properly awarded the Applicant.*

Before I determine the merit of the application, I will comment on the Respondent's allegation that the reply to counter affidavit should be expunged from the records because it is deponed by the Applicant's Counsel. The Applicant quickly conceded to the argument. On such basis, the reply to counter affidavit is hereby expunged from the records

for being deponed by the Applicant's Advocate without notifying the Court.

To start with the first issue as to whether the Respondent proved the misconduct levelled against the Applicant, the termination letter (exhibit D14) indicates that the Applicant was terminated from employment for gross negligence which caused the missing of 110MT of DAP fertilizer in Dar es Salaam plant storage. It was Mr. Mafuru's submission that the Arbitrator misapplied the principles of negligence as cited in the case of **Donoghue v. Stevenson** [19921 UHK 100 as well as the case of **Tanga Bancorp (T) Ltd v. David Kanyika**, Labour Revision No. 346 of 2013 at Dar es Salaam (unreported), In both cases, the following principles were established:

- (i) That, there was a duty of care.
- (ii) That, the duty was breached.
- (iii) That, the breach caused loss.

Counsel Mafuru Mafuru was of the view that the Applicant was assigned new role without required qualifications. That, even the job description of the newly assigned roles was not given to him. He submitted at length how the Applicant was not qualified with the newly assigned position. He stated that the Applicant executed his daily works under directions and instructions of his boss.

In relation to investigation report (exhibit D16), it was submitted by Counsel Mafuru that the same was not authentic, neither did it bare stamp of the Respondent nor any signature of the maker. That, DW3 testified at the CMA that no stock auditing report was tendered as an exhibit at the trial. He maintained that; DW3 was incompetent witness, and she gave immaterial and inconsistency evidence, hence, not legally tenable. In support of his submission, Counsel Mafuru referred to the case of **The Director for Public Prosecutions v. Sharif s/o Mohamed @ Athumani & 6 Others**, Court of Appeal of Tanzania, Criminal Appeal No. 74 of 2010 [unreported] at pp. 8 & 9.

Counsel Mafuru was of the view that the reason for termination was not proved. He stated that there was no clear provision or guideline of the employer which was proved by the Applicant. He argued that the employer is required to prove existence of policy and guidelines at work as it is the Court's position in the case of **Haruna H. Kimambo v. Security Group (T) Ltd**, Revision No. 42 of 2016, High Court of Tanzania Labour Division at Dar es salaam (unreported), pp. 16, 18, 20 and 21.

In response, Mr. Mkumbukwa submitted that the trial Arbitrator properly analyzed and considered the evidence regarding reasons for

termination as appearing at pp. 7,12,13 and 14 of the Award. DW3, the Respondent's Finance Manager testified that the Finance Department carried out investigation (as per the investigation report exhibit D16) and found that there was a loss of 110 tons of fertilizer namely DAP from the stock. He further testified how they came to realize that 110 Tons were lost in the warehouse which is under the supervision of the Applicant as reflected in pp. 52 and 53 of the proceedings.

In determining this issue, it is worth noting that; in disputes of unfair termination, it is the duty of the employer to prove that the termination is fair. This is pursuant to *Section 39 of the Employment and Labour Relations Act, Cap 366 revised Edition 2019 (herein ELRA)* which is to the effect that:

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

I have observed Mr. Mafuru's argument that the employer should have tendered the rules or policy which were contravened by the Applicant. With due respect to such submission, in Tanzania, employment relationship is governed by the *ELRA* and the guidelines. Therefore, some of the misconducts are listed in the relevant law,

whereas some may be provided in the employer's guidelines. As the record indicates, the Applicant was terminated for gross negligence. The misconduct is provided under *Rule 12(3)(d) of GN. No. 42 of 2007*. Hence, where the employer's guidelines do not provide for the misconduct in question, the general law and its rules applies.

In the matter at hand, on the basis of exhibit D16, the Arbitrator found the Respondent proved the misconduct levelled against the Applicant. Exhibit D16 was tendered by DW3 when testifying before the CMA. The named witness stated that the exhibit in question is an investigation report as it is reflected at page 53 of the CMA typed proceedings.

I have critically examined the exhibit in question and other exhibits tendered by the Respondent in support of his allegation. The Respondent has managed to prove that as per the job description (exhibit D2), it was the Applicant's responsibility over dispatch functions, team and all performance deliverables, entrusting him with the stock control and responsibility.

Looking at exhibit D16 which was relied by the Arbitrator, the same does not indicate if it is an investigation report or a normal stock taking report. The document listed the system quantity and physical quantity.

The item of DAP, which is the product alleged to have been missing, the kilogram in the system quantity tally with the physical quantity. Therefore, the report itself is not self-explanatory. It is very difficult to comprehend the alleged loss. Furthermore, it is not even dated to show when the stock was taken. Taking into consideration that the report was not tendered during disciplinary hearing, it is my view that the date of the report was of paramount importance.

Moreover, during the disciplinary hearing, there is no any evidence tendered to prove the misconduct levelled against the Applicant apart from oral evidence from the witnesses. This is clearly reflected in the disciplinary hearing minutes (exhibit D9). Under such circumstance, it is my view that the evidence available in record is not sufficient enough to hold the Applicant responsible for the commission of the misconduct charged.

Therefore, I join hands with the Applicant's submission that the Arbitrator failed to properly consider the evidence available in record. Since it is found that the Respondent did not prove the misconduct levelled against the Applicant, I find the Applicant was unfairly terminated both substantively and procedurally.

Turning to the last issue, the Applicant prayed for fourteen (14) month's salaries as compensation of unfair termination, three months' notice pay, leave allowance for two years, severance payment, general damages and certificate of service before the CMA. To begin with the first prayer of 14 month's salary, the compensation of unfair termination is provided for under *Section 40(1) (c) of the ELRA (supra)*. The provision provides for compensation of not less than 12 months remuneration. In the circumstances of this case, it is my view that the Award of 12 months remuneration suffice justice.

Regarding the payment of notice, the termination notice (exhibit D14) indicated that upon termination, the Applicant was paid one month salary as termination notice, salary to the last working day and outstanding leave allowance. Thus, the Applicant is not entitled to notice pay as claimed because he was paid upon termination. As to the claim of general damages, the same is not justified to the circumstances of this case. The Applicant also prayed for certificate of service. He is entitled to the same pursuant to *Section 44(2) of the ELRA (supra)*.

As to the payment of severance allowance, I have noted Mr. Mafuru's submission that the Arbitrator did not award the same because the Applicant was terminated for misconduct and that he did not claim

for the same in his CMA F1. As stated above, in the CMA F1, the Applicant also pleaded for severance allowance. Since it was proved that the Applicant was unfairly terminated both substantively and procedurally, it is my view that, the Applicant is entitled to severance pay as it awarded pursuant to *Section 42 of the ELRA (supra)*. In the circumstance of this case, where the Applicant was employed on 01/03/2016 and terminated on 03/09/2020, it is my findings that the Applicant is entitled to severance allowance of three years to the tune of TZS 2,717,731.02.

In the end result, I find the present application has merit. The Applicant's termination was unfair both substantively and procedurally. Consequently, the CMA's Award is hereby revised and set aside. The Respondent is ordered to pay the Applicant a total of TZS 43,095,448.98 being, twelve-month salaries as compensation for unfair termination and severance allowance.

It is so ordered.



Y. J. MLYAMBINA

JUDGE

15/12/2023

Judgement pronounced and dated 15th December 2023 in the presence of the Applicant and his Counsel Mafuru Mafuru and Elizabeth Dominick Nyabige for the Respondent. Right of Appeal fully explained.



A handwritten signature in blue ink, appearing to read 'Y. J. Mlyambina'. The signature is fluid and cursive, with a long horizontal stroke extending to the left.

Y. J. MLYAMBINA

JUDGE

15/12/2023

HIGH COURT