IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 281 OF 2023

BETWEEN

ABAS ALLY NYABWA ..... APPLICANT

VERSUS

HESU INVESTMENT LIMITED ..... RESPONDENT

JUDGEMENT

Date of last Order: *07/12/2023*
Date of Judgement: *14/12/2023*

MLYAMBINA, J.

The Applicant through his Personal Representative, Majaliwa Musa has preferred this application seeking for his for this Court to revise and set aside the Award of the Commission for Mediation and Arbitration of Temeke (herein CMA) in *Labour Dispute No. CMA/DSM/TEM/ 138/122/2022.* The application was supported with the affidavit of Abas Ally Nyabwa, the Applicant. At the hearing, Majaliwa Musa craved leave of the Court for the Notice of application and affidavit to be adopted as part of his submission. He relied on paragraph 12, 13 and 14 of the supporting affidavit. Paragraph 12 states that:

> The Arbitrator erred in law and fact in accepting that there was abscondment from work from 14/03/2022 while the

Respondent admitted that on 14/03/2022 is the day which he gave him the Vehicle to load the luggage at the Port.

Mr. Musa submitted that; the Applicant told the CMA that he entered into employment relationship with the Respondent on 09/08/2021. Their employment relationship lasted for seven months only. The salary was TZS 200,000/= per month. It was one year Contract ending on 09/08/2022. In support of such evidence, the Applicant tendered the contract of employment before the CMA. It was admitted and marked P1. There was no any objection from the Respondent.

Thereafter, the Applicant told the CMA that; on 14/03/2022, he received a letter from his Employer (the Respondent). It was a letter dated 09/03/2022 with heading "KUACHISHWA KAZI KWA UZEMEBE ULIOKITHIRI NA KUSABABISHA KAMPUNI KUPATA HASARA YA ZAIDI TZS 9,000,000/=. It is the letter he received on 14/03/2022. To prove that before the CMA, he tendered the letter as a proof of his employment termination dated 14/03/2022. It was admitted as exhibit P2.

It was the submission of Mr. Musa that; the Applicant was not paid anything apart from being promised to receive his remuneration entitlements which included his salary for February, 2022 amounting TZS

200,000/=, his Notice salary of one month amounting TZs 200,000/= and compensation of the remaining five months' salary amounting TZs 1000,000/=. The total claim was TZs 1,400,000/=. The Applicant proved before the CMA that he was not involved on any offences listed in the letter of employment termination. It was further submitted that the Applicant employment was terminated since 14/03/2022. He prayed the Award of CMA be nullified and order the Respondent pay him the claim of TZS 1,400,000/=.

On the second ground, paragraph 13 of the supporting affidavit states that:

> The Arbitrator erred in law and in fact to admit the amended termination letter which instead of being dated 09/03/2022 it read 09/04/2022.

It was the submission of Mr. Musa that the Applicant was not involved in such amendment of the letter. He remained with the original letter. He argued that such letter was used as secondary evidence. It was admitted before the CMA and marked Exhibit D4. Such letter was in contradiction with *Section 67 (1) (a) of the Law of Evidence Act [Chapter 5 Revised Edition 2019] (herein TEA)* which requires secondary evidence to be used only when original document has been submitted.

It was further argued by Mr. Musa that the Respondent used secondary evidence after tendering notice. The notice was produced on the same day of hearing. Despite of the objection, the CMA admitted it. It was the view of Mr. Musa that such letter (exhibit D4) has two weaknesses: *One*, it is a copy. *Two*, it is not recognized by *Section 67 (1) (a) of TEA*. The letter shows it was received on 14/03/2022 while it was written on 09/04/2022.

The last ground was based on paragraph 14. It states that:

> The Arbitrator erred in law in holding that the Disciplinary Committee meeting was convened and directed on the proposed appropriate punishment to the Applicant after the allegation dated 14/03/2022.

Mr. Musa submitted that there was no such meeting and there are no any minutes for such meeting which was convened. Through the evidence of the Respondent adduced before the CMA, at page 8 paragraph 2 of the Award, it shows that the Respondent deponed that the disciplinary committee meeting proposed for termination of employment of the Applicant. After tendering such evidence, the procedure was complied with.

In adherence to termination procedures, it was submitted by Mr. Musa that the procedure of terminating an employee from employment is

not proved with the termination letter of employment. That, termination is the last stage after complying with all the procedures. Through his evidence, the Respondent ought to have proved before the CMA that he complied with twelve steps among others: *One*, to prove before CMA that in his Company, the Respondent had disciplinary policy. This is as per *Rule 11(1) of the Employment and Labour Relations, (GN. No. 42 of 2007) (herein GN. No. 42 of 2007). Two*, to prove before CMA that he annexed such policy with the Employment Contract. This is as per *Rule 11(3) of GN. No. 42 of 2007. Three*, to prove before CMA the offences committed and which steps of warning undertaken by the Respondent before termination as per *Rule 11(4) (supra).*

Four, to prove before CMA on the investigation done to reveal which offences were done in order to convene a disciplinary meeting. This is as per *Rule 13 (1). Five*, to prove before CMA the procedure used to inform the Applicant about disciplinary meeting as per *Rule 13 (2). Six*, to prove before CMA as to which time was afforded to the Respondent to get prepared to answer the issues concerning him as per *Rule 13(3). Seven*, to prove before CMA as to whether the Applicant proved commission of the offence and who was the Chairman of that meeting as per *Rule 13 (4).*

Eight, to prove before CMA on which evidence were tendered before the CMA Disciplinary Committee to prove the offence done as per *Rule 13 (5)*. *Nine*, to prove before the CMA on who represented the Applicant before the CMA Disciplinary Committee as per *Rule 13 (9)*. Lastly, to prove before CMA on the opportunity to give last explanation concerning soliciting lowering of the punishment or to remove it at all as per *Rule 13 (7)*.

In response to the first ground, Mr. Edward Simkoko, Personal Representative for the Respondent denied the contention that the Respondent admitted having given a letter to the Applicant on 14/03/2023. The reason being that by that time the Respondent was already terminated from employment. He stated that the Applicant was terminated on 09/04/2022. There was a typing error. This can be proved on the last paragraph. The Letter reads that the Applicant was terminated on 09/04/2022. On the same letter, the last paragraph reads "KAMPUNI INAKUACHISHA KAZI KUANZIA TAREHE 11/04/2022". These were typal error. He added that; even the letter to attend disciplinary meeting was written on 06/04/2022. There was no any objection from the Applicant at the CMA. Also, CMA F1 mentions the date of termination is 11/04/2022. He

argued that since parties are bound by their pleadings, the Applicant should be bound thereto.

On the second ground, it was argued in reply that; since the Applicant was not the author of the letter, he could not be summoned to witness amendment of the letter in question. On the contention of using secondary evidence, he submitted that they filed notice to produce. The Applicant objected because it was not satisfied. The CMA is not bound by technicalities as such, there is no procedure which was violated when admitting exhibit D4.

In response to the last ground, it was submitted that; the Applicant was given a letter to show cause followed by the Letter to attend disciplinary committee. He maintained that the Applicant absconded from work since then the Applicant knew about the date of meeting. He said, the Applicant denied himself the right to be heard. In the upshot, he strongly submitted that the Applicant was lawfully terminated from employment for abscondment. Thus, this application be dismissed for lack of merit.

In rejoinder Mr. Majaliwa submitted that the letter to attend disciplinary hearing dated 6/4/2022 was received by the Applicant on the date he went to follow up his entitlements. That, the letter was written on 6/4/2022 while the Applicant was terminated on 14/03/2022. That shows the letter was an afterthought. The reason of receiving that letter was being cheated by the Employer that if he never received the letter his entitlements could not be processed. That is why there is no minutes to show if the meeting was convened or not. It is nowhere to know if the Applicant attended such meeting or not.

On the letter of termination promising the Applicant to be terminated on 11/04/2022, it was admitted that it is true the words reads that he could be terminated on 11/04/2022. But the Applicant could not tolerate at that time. He sought it was far. He served him on 14/03/2022 which is in line with exhibit D4 tendered by the Respondent. On CMA F1, it was argued that *Rule 10(1) of the Labour Institutions (Mediation and Arbitration) Rules, GN No. 64 of 2007 (GN. No. 64 of 2007*) requires dispute of termination of employment must be referred within 30 days. He therefore urged the Court to allow the application.

After going through the parties' submissions, CMA and Court records as well as relevant laws, I find the Court is called upon to determine the following issues: *Whether the Respondent terminated fairly the Applicant both substantively and procedurally, and; to what reliefs are the parties entitled to.*

To start with the first issue, the termination letter (exhibit D4) indicates that the Applicant was terminated for four misconducts namely, failure to attend disciplinary hearing in relation to loss of 9 tires of the track which he was driving (T305DSY/T344DTB), negligence, abscondment from 15/03/2022 to 05/04/2022 and causing loss to the company by loosing tires worth 9,000,000/=. The arbitrator found that the Respondent proved the misconducts levelled against the Applicant.

To begin with the first allegation of failure to attend disciplinary hearing in relation to loss of 9 tires of the track which he was driving (T305DSY/T344DTB), DW1 testified that; on 14/03/2022 the Applicant was given vehicle to load the luggage at the port. He abandoned the vehicle together with the luggage on the allegation that he was drunk. After the information reached the company, they assigned another drive to go and

collect the vehicle together with the luggage where it was found out that all new tires of the relevant vehicle were changed by the Applicant. The Applicant was confronted and defended himself as per exhibit D3.

I have read the content of exhibit D3, it is the Applicant's reply in respect of the incident occurred on 27/11/2021. Therefore, exhibit D3 cannot be relied to the incident alleged to have occurred on 14/03/2022. After thorough examination of the records, there is no evidence on the incident dated 14/03/2022 as claimed by the Respondent. Hence, such allegation was not proved. Regarding the allegation of causing loss and negligence, the same were also not proved by the Respondent. The alleged negligence and loss were in respect of the incident that happened on 14/03/2022. Therefore, since there is no evidence to prove the occurrence of the alleged incident, then all the misconducts arrived there at lacks stand.

As regards to the allegation that the Applicant absconded from work from 14/03/2022 to 05/04/2022, though there is no direct evidence tendered to prove the same, the circumstances of the case indicate that the Applicant did not attend to work. As per the notice to attend

disciplinary hearing dated 24/03/2022 (exhibit P3), the Applicant was called on to a disciplinary hearing which he also admits that he did not attend. On the Applicant's failure to attend to such meeting on 06/04/2022, he was served with another notice to attend disciplinary hearing (exhibit P4).

The Respondent alleges that the disciplinary meeting proceeded ex-parte in absence of the Applicant. Admittedly, as per *Rule 13 (6) of GN. No. 42 of 2007* an employer is empowered to proceed with the disciplinary hearing in case an employee unreasonably refuses to attend. The provision is to the effect that:

> Where an employee unreasonably refuses to attend the hearing, the employer may proceed with the hearing in the absence of the employee.

In this case, it is alleged that the disciplinary hearing proceeded in absence of the employee. However, no proof has been tendered to prove that the meeting in question proceeded in absence of the Applicant.

I have noted the Applicant's allegation that the Respondent used secondary evidence. I will not dwell much on such allegations. As rightly submitted by the Respondent, through the CMA F1, the Applicant himself indicated that the dispute arose on 11/04/2022. That is the correct date of

termination which is also indicated in the termination letter (exhibit D4). Thus, the alleged date of 09/03/2022 was a mere typing error as submitted.

Turning to the last issue, since it is found that the Applicant was unfairly terminated from employment both substantively and procedurally, it is my view that he is entitled to the reliefs claimed. The record shows that the Applicant was under fixed term contract of one year. Upon termination, he remained with five months term then he is entitled to compensation of the remaining period of the contract. That is the position in the daily cited case of **Good Samaritan v. Joseph Robert Savari Munthu**, Labour Revision No. 165 of 2011, High Court Labour Division, Dar es Salaam (unreported).

In the result, I find the present application has merit. the CMA's Award is hereby revised and set aside. The Applicant is therefore entitled to one month salary in lieu of notice and five months salaries of the remaining period of contract to the tune of TZS. 1,200,000/=.

It is so ordered.

Y. J. MLYAMBINA

JUDGE

14/12/2023

Judgement pronounced and dated 14th December, 2023 in the presence of the Applicant and Edward Simkoko, Personal Representative of the Respondent. Right of Appeal fully explained.

Y. J. MLYAMBINA

JUDGE

14/12/2023