

TANZANIA / JUDGMENT

abubakar meral abbas and others vs lake trans ltd 2020 tzhcld 24 30 september 2020

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30 September 2020

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IN THE HIGH COURT OF TANZANIA LABOUR DIVISION AT PAR ES SALAAM REVISION NO. 836 OF 2019 BETWEEN ABUBAKAR MERAL ABBAS & 2 OTHERS..... APPLICANTS VERSUS LAKE TRANS LTD..... RESPONDENT

JUDGEMENT

Date of Last Order: 20/07/2020 Date of Judgement: 30/09/2020 Aboud, J. Aggrieved by the award of the Commission for Mediation and Arbitration (herein to be referred as CMA) the applicants filed this application by way of Notice and Chamber Summons and their joint affidavit. The applicants moved the Court for the orders that this Honourable court be pleased to revise, quash and set aside the award issued by Hon. Kokusiima, L. in Labour Dispute No. CMA/DSM/TEM/559/2016 dated 02/10/2019. i The facts led to this application can be briefly explained as follows. On different dates the applicants were employed by the respondent as drivers. On 31/10/2016 the applicants were alleged to have been engaged in unlawful strike and that they disobeyed the respondent's order. The applicants were summoned before the Disciplinary hearing Committee where they were found guilty of the alleged misconducts. They were therefore terminated on 10/11/2016. Dissatisfied with the employers decision they referred the dispute to the CMA where it was decided on their favour that the termination procedures were partial violated. Hence, the Arbitrator awarded the applicants four months compensation. The applicants being resentful by that decision they filled this application. During hearing both parties were represented. Mr. Jimmy Mnkeni, TAROTWU, Trade Union representative was for the applicants while Mr. Heriolotu Boniface, Learned Counsel appeared for the respondent. The matter proceeded by way of written submission. In support of the application Mr. Jimmy Mnkeni submitted that, the Arbitrator failed to adhere to labour laws and rules by relying to wrong document (1st applicants' written warning- Exhibit Tl) which 9 was issued two years before the dispute arose. To strengthen his submission he cited the case of Knight Support (T) Ltd. vs. Ramadhani Magina Igai, Rev. No. 317 of 2013. Mr. Jimmy Mnkeni went on to submit that, there was no any piece of evidence at the CMA to prove that the applicants were engaged in unlawful strike. He added that, there was no proof of participation of other authorities such as trade unions and the police who were involved to suppress the strike in question. As to termination procedures Mr. Jimmy Mnkeni submitted that, the Arbitrator erred in law and fact by holding that procedures were followed while there

was a lot of irregularities in the whole proceeding of the disciplinary hearing contrary to rule 9 (1) of the Employment And Labour Relations (Code of Good Practice) GN 42 of 2007 (herein GN. No. 42 of 2007), as reflected in Disciplinary hearing minutes (Exhibit T6). He therefore stated that, the arbitrator misdirected herself by relying in the case of NBC Ltd. Mwanza vs. Justa Kyaruzi, Rev. No. 79 of 2009 and the case of South African Labour Court in National Education and Allied Workers Union vs. Medicor. 3 Mr. Jimmy Mnkeni further submitted that the Arbitrator misdirected herself to award the applicant 4 months. He therefore prayed for the application to be dismissed. Responding to the application Mr. Heriolotu Boniface submitted that, it is undisputed fact that as per the labour laws the written notice is valid for the period of six months. He stated that it is also clear that the Hon. Arbitrator did not rely on exhibit T1 only to reach the verdict but he based on other procedures which were followed before the applicants were terminated. He added that apart from Exhibit T1 which was issued to the first applicant, still the applicants committed another offence of which the respondent undertook the necessary procedures before terminating them. Mr. Heriolotu Boniface further submitted that, the claim of evidence from other authorities by the Applicant's representative is not backed up by the law being requirement for unlawful strike. He stated that the respondent is a company which deals with a business of transportation, therefore the applicant's act of refusing to transport fuel on time may lead to loss of business on part of the respondent the fact which does not require any documentary proof. 4 Mr. Heriolotu Boniface submitted that, before the applicants were terminated the necessary procedures were followed as they were given chance to state the reasons for their strike which was tendered at the CMA as Exhibit T2. He stated that the applicants were summoned in a disciplinary meeting according to Exhibit T3 and later on they were issued with termination letter Exhibit T4. He added that the applicants were paid all their entitlements as evidenced by Exhibit T5. In rejoinder the applicants reiterated their submission in chief. Having gone through and considered the CMA and Court's records as well as submissions by both parties, it is my view that the issues for determination before the Court are whether there are sufficient reasons for this Honourable Court to revise, quash and set aside the proceedings and award of the CMA, whether the trial Arbitrator properly evaluated the evidence given and reached the verdict of fairness of termination and to what relief are the parties entitled. On the first issue as to whether there are sufficient reasons for this Honourable Court to revise, quash and set aside the proceedings and award of the CMA. The applicant urged the Court to revise the whole proceeding because the Arbitrator relied on a wrong document that is the applicants' written warning (Exhibit T1). I have dully examined the document in question it is a warning letter which was issued to the first applicant on 21/06/2014 for misconduct. The applicants' representative argued that it was wrong for the Arbitrator to rely on such exhibit because it was issued two years before this dispute arose. The applicants' representative disputes the Arbitrator's finding at page 12 of the award where he stated that:- "Hoja ya pili ni kama utaratibu uliotumika wakati wa kusitisha ajira ya walalamikaji. Kwanza mlalamikaji Abubakari aliwahi kuonywa kupitia kielelezo T1 kwa kugoma kushusha mafuta katika depoti aliyokuwa amepangwa. Na mgomo huu pia yeye alionekana kuwa mstari wa mbele kwa kuwashawishi wenzake ingawa wengine waliuelewa uongozi na kuendelea na kazi". Loosely translation of the quotation above is that in the second issue the Arbitrator examined if the termination procedures

were followed. He stated that, the first applicant, Abubakari was issued with a written warning Exhibit T1 for refusing to unload fuel in the directed depot. He further stated that in the present case the applicant was the initiator/instigator of the strike despite the fact that his fellow employees obeyed the respondent directives and proceeded with their work. It is the requirement of the law that written warning has to be operative for the period of six months. This is in accordance with Guideline 9 (2) of the Guidelines for Disciplinary, Incapacity and Incompatibility Policy and Procedures which is to the effect that:- "Guideline 9 (2) Written warnings and final written warnings should be kept on an employee's personal file and should remain operative for six months". On the basis of the above quotation it is my view that the Arbitrator was wrong to rely on such exhibit to conclude that the first applicant was the one who initiated the said strike. As provided above written warning is operative for the period of six months only. The written warning in question was issued on 2014 while the applicants were terminated on 2016. Thus it was wrong for the Arbitrator to rely on the same since it was issued two years before the dispute as rightly submitted by the applicant's representative. The question to be addressed is what is the remedy for such an error? The applicant's representative urged the Court to dismiss the entire CMA proceeding. In my view dismissing the whole CMA proceedings is not a remedy in the circumstance at hand where such an exhibit can be disregarded and determine the dispute basing on other evidence on record. Furthermore as rightly submitted by the respondent's Counsel the Arbitrator's finding did not solely based on the content of Exhibit T1. Thus the proceedings in this case are not worthy to be revised on the alleged ground. On the second issue as to whether the trial Arbitrator properly evaluated the evidence given and reached the verdict of fairness of termination, the applicants alleged that they were unfairly terminated both substantively and procedurally. For the Court to determine this issue I will critically examine the reason for termination and the procedures thereto as required in law. As to the reason of termination it is on record the applicants were terminated because of their two misconducts, namely being engaged in unlawful strike and insubordination. The term strike has been defined under section 4 of the Act to mean:- "Means a total or partial stoppage of work by employees if the stoppage is to compel their employer, any other employer or an employers association to which the employer belongs, to accept, modify or abandon any demand that may form the subject matter of a dispute of interest". From the definition of strike two necessary elements can be constructed:-

- i) Partial stoppage of work by employees. ii) To compel their employer or employers association to modify or abandon their demand which form subject matter of a dispute. As to the term "unlawful strike" the Act did not directly defined the same, however it has pointed out the procedures for engaging in a lawful strike which have the meaning that if the laid down procedures are not followed then any strike will be defined as unlawful strike. The laid down procedures of a lawful strike are Q provided under section 80 (1) of the Act, which I quote for easy of reference:- "80. - (1) Subject to the provisions of this section, employees may engage in a lawful strike if:-
 - (a) The dispute is a dispute of interest;

- (b) The dispute has been referred in the prescribed form to the Commission for mediation;
 - (c) The dispute remains unresolved at the end of period of mediation provided under section 86 (4) read with subsections (1) and (2) of section 87.
 - (d) The strike is called by a trade union, a ballot has been conducted under the union's constitution and a majority of those who voted were in favour of the strike; and
 - (e) After the applicable period referred to in paragraph (c), they or their trade union have given fourty eight hours notice to their employer of their intention to strike. In the present application the applicants testified at the CMA that on the alleged date all respondent's drivers were gathered in their usual place. They stated that the first applicant and the respondent's Human Resource officer went where they were gathered to hear their complaints. Under such circumstances it is my view that the applicants stopped to work for some time and demanded the respondent as their employer to modify their employment environment. In fact they were against the increase of transit loss. The respondent submitted that the applicants were given new orders to supply but they refused to do so. Under such circumstances, I asked myself if the applicants had no intention to strike as claimed why they refused to obey the order by the Human Resource Officer that they should go back to work. In this case it is undisputed fact that on the alleged day the applicants stopped to work for some time, they also had their demand which they compelled their employer to modify. It is therefore crystal clear that, they engaged in a strike as is defined under section 4 of the Act which I have discussed above. The record reveals that the applicants were engaged in a strike without following the above stipulated procedures. Therefore it is apparent they were engaged in unlawful strike. It is an established principle that employees' participation in unlawful strikes amount to misconduct which may justify termination of employment as is provided under rule 14 (2) of GN. 42 of 2007. From the above discussion is clear that the applicants participated in unlawful strike and therefore they committed the offence as rightly found by the Arbitrator because their failure to off load or unload fuel to the destination were ordered, they placed the respondent's viability of his business at serious risk. On the second issue as to whether the respondent followed the procedures for termination, generally the termination procedures for misconduct are provided under Rule 13 of GN. No. 42 of 2007 read together with Guideline 4 of the Guidelines for Disciplinary, Incapacity and Incapability Policy and Procedures GN. 42 of 2007 (herein the Guidelines). In particular to the case at hand, the procedures in terminating an employee who participated in unlawful strike are provided under Rule 14 of GN. 42 of 2007, I quote some of the relevant procedures for easy of reference:- "14 (3) - Prior to termination of the employee the employer shall, at the earliest opportunity, contact a trade union official to discuss the course of action it intends to adopt.
- (4) The employer shall issue an ultimatum in clear and unambiguous terms which states what is required of the employee and what sanction shall be imposed if they do not comply with the ultimatum.

- (5) The employee shall be allowed sufficient time to reflect on the ultimatum and respond to it, either by complying with it or rejecting it. What constitutes 'sufficient time' shall depend on the circumstances of each case, but normally would allow the employee to reflect on the ultimatum over night.
- (6) Where the employer cannot reasonably be expected to take these steps, the employer may dispense with them for the 13 reason that the employee or his representative refuse to meet with the employer". In this application the record reveals that the above stipulated procedures were not complied with at all. The respondent applied the general procedures for misconduct. However even the procedures for misconduct applied by the respondent were not followed at all. The disciplinary minutes tendered (Exhibit T6) does not reflect that the disciplinary hearing was conducted. The relevant document looks like an empty document which was only signed by the persons alleged to have attended the said meeting. As rightly submitted by the applicants representative the document in question has no name of the chairman of the meeting and signature, date and time of the meeting, charges against the applicants, summary of the parties evidence, findings, comments and outcome of the such meeting. On the basis of the above discussion I do not agree with the Arbitrator's findings that the termination procedures were partially not adhered. In my considered view the termination procedures in this application were not adhered at all. The gist of the applicants' termination of employment is due to the reason that they were engaged in unlawful strike but as revealed from the record the respondent did not follow the mandatory procedures as stipulated above. Thus, the termination in this matter was procedurally unfair. On the last issue about parties' relief, I will direct my mind to what is sought in CMA Fl where the applicants prayed for the following reliefs:-
- i. Notice ii. Compensation of 48 months. iii. Leave iv. Severance pay.
 - v. Mental and psychological damages amounting to Tshs. 150,000,000/=. vi. Payment of remaining period of the contract. vii. Certificate of service. viii. General damages. ix. Any relief the CMA deemed fit to grant.
 - x. Subsistence allowances while awaiting for payment of terminal benefits (Tsh. 20,000/= per day). Basing on the above discussion as it is proved that the applicants were unfairly terminated, thus they are entitled for the 15 remedies available according to the labour laws of the land. I therefore find that they are entitled to compensation as is provided under section 40 (1) (c) of the Act, however not for 48 months as awarded by the Arbitrator. In my view applicants did not adduce any sufficient reason to justify such amount of compensation. I therefore award them compensation of 12 months salaries. Applicants are also entitled one month salary in lieu of notice, severance pay, leave payment if not taken and certificate of service. The applicants also claimed for the payment of psychological, mental and general damages which I found that they failed to justify the same. Turning to the payment of the remaining period of the contract, upon perusal of the record in Court I find there is no any written contract which was tendered to show the nature of employment contract between the parties. In the record PW1 testified at the CMA that the applicants

were in indefinite period of the contract, however, there was no written document to prove that. Therefore since they have awarded compensation of 12 months as stipulated under section 40 (1) (c) of the Act, they are not entitled for the payment of the remaining period of contract as they claimed. 16 Regarding to the payment of subsistence allowance, the same is paid while waiting for transport allowances. In the application at hand the parties did not tender any evidence to justify the payment of transport allowance, hence the applicants are entitled to transport allowances and subsistence allowance at the calculation provided under Regulation 16 of the Employment and Relations (General) Regulations GN. 47 of 2017 which provide that:- "16 (1) - The subsistence expenses provided for under section 43 (1) (c) of the Act shall be quantified to daily basic wage or as may, from time to time, be determined by the relevant wage board". Under the circumstance of the case, I have no hesitation to say that the present application has merit. In the result the Arbitrator's award is hereby revised and set aside because the applicants' termination was unfair procedurally. The respondent is ordered to pay the applicants one month salary in lieu of notice, compensation of 12 month salaries, severance pay, 17 transport and subsistence allowances, leave payment if not taken and certificate of service. It is so ordered. I.D. Aboud JUDGE 30/09/2020

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Prepared on 14 October 2026 · Esheria