

TANZANIA / JUDGMENT

charan singh and sons limited vs godfrey urio 2020 tzhc 4538 27 november 2020

COURT
TZHCDECIDED
27 November 2020

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IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA LABOUR DIVISION MOSHI
REGISTRY AT MOSHI REVISION APPLICATION NO. 8 OF 2020 (Arising from the decision in
mediation settlement in MCA/KLM/MOS/ARB/3/2019 before G.P. MIGIRE Arbitrator delivered on
28/02/2020) CHARAN SINGH AND SONS LIMITED.....APPLICANT VERSUS GODFREY
URIO.....RESPONDENT 3rdNOVEMBER&27th NOVEMBER, 2020.

RULING

MKAPA, J: The Applicant is seeking for revision of the Award of the Commission for Mediation and Arbitration (CMA) at Moshi in Labour Dispute No. MCA/KLM/MOS/ARB/3/2019 dated 28th February 2020 by G.P.Migire. The application is brought under section 91(1) (a)

- (2) (b) and (c), Section 91(4) (a) (b) and section 94 (1) (b) (i) of Employment and Labour Relations Act. No. 6 of 2004 read together with Rule 24(1), (2), (a), (b), (c), (d),(e)(f),(3)(a)(b)(c) and (d) 28
- (1) (c) (d) and (e) of the Labour Court Rules, 2007 G.N. No. 106 of 2007. The Application is supported by sworn affidavit of Mr. David Shilatu learned counsel for the Applicant. The respondent opposed the application and filed a counter affidavit. Brief background of this application is that, the Respondent was employed by the Applicant as a driver. The applicant had installed a car tracking system and email system. It was alleged that on 4th October at 01:00 PM the respond did temper with the car tracking system by disconnecting from the main power. It was further alleged that although disconnected, the system continued sending messages to the effect that the car was detoured from the normal route and was located at Kifanya enroute to Njombe-Songea road loaded with electricity poles. It was further alleged that on 23rd October 2018 the respondent returned from the journey and reported back to the office when he met one Mr. Elisa Mkiramweni (Head of drivers). Mr. Mkiramweni informed the respondent that he had instructions from Baraji Singh a.k.a Sonee for him not to report to work. It was further reported that on 25/10/2018 the respondent reported back to office, and one Mr. Siyao, human resource officer handed him a letter. Upon reading the same the respondent discovered that it was a termination letter which stated the reasons for termination being carrying unauthorized cargo. Dissatisfied,

the respondent lodged a complaint before the Commission for unlawfully termination which decided in his favour by awarding him shillings 4,800,000/= being 24 month's salary, one month salary in lieu of Notice shillings 200,000/=: one month salary in lieu of leave Tsh. 200,000/= severance pay Tsh. 53,846/= which in total amounted to shillings 5,253,846/=. Aggrieved, the applicant preferred the instant application. On 23rd day of September, 2020 when the matter was set up for hearing it was agreed the application be heard by way of written submission. The applicant was represented by Mr. David Shilatu learned advocate while the respondent appeared in person, unrepresented. Submitting in support of the application Mr. Shilatu by way of introduction submitted the fact that, matter was heard on merits at the Commission and in the course of hearing the Arbitrator drafted the following issues:-

1. Whether or not there was valid reason for termination of employment.
2. Ikiwa mwajiri alifuata taratibu.
3. Ni haki gani kila mmoja anastahili. It was Mr. Shilatu's contention that the Commission's Award was illegally procured by the Arbitrator who determined the same 3 without taking into consideration the framed issues thus, detrimental to the applicant. Mr. Shilatu went on submitting the fact that, the respondent was summoned to enter appearance before the hearing committee where the applicant adduced evidence to the effect that a recorded device installed in the applicant's truck driven by the respondent had revealed the Respondent to have detoured from the normal route and was located at Kifanya Village at Njombe - Songea road carrying electricity poles without authorization of the Applicant. The pictures of the electricity poles inside the truck were tendered and admitted in evidence as exhibit and the respondent himself or his legal representative never objected the admission of those photos. It was Mr. Shilatu's further contention that the admission by the Respondent would suffice to terminate the Respondent employment service with the Applicant. To support his argument he cited Revision No. 22 of 2014, Nickson Alex V Plan International where Nyerere J. Held that:- "Since the Applicant admitted the offence he committed even if the employer would not have conducted the disciplinary hearing the position would be the same as the applicant admitted the offence he committed" 4 It was Mr. Shilatu's argument that, the Arbitrator failed to analyse the evidence of DW1 (Omar Azim Omar) applicant's transport operation manager, and for unknown reasons wanted him to bring the device that was used to capture the photos to the attention of the Commission. He went on explaining the fact that the arbitrator was bias as he wanted the device a computer saver to be brought before the CMA and objected the photos that were admitted in evidence without any objection from the respondent or his legal representative as dateless when they were taken. Mr Shilatu finally prayed for this court to quash and set aside the Award by Commission for Mediation and Arbitration. Responding against the Application the respondent faulted applicant's failure to produce original evidence (primary evidence) to substantiate their case before the Commission as required by the law thus all applicants' witnesses (DW1 & DW2) failed to establish material facts to support their evidences as

required under section 37(2) of Employment and Labour Relations Act. No. 6 of 2004 which provides that; I (2J)...the termination of employment by employer is unfair if the employer fails to prove:-

- (a) The reasons for the termination is valid. 5
- (b) That the reason is a fair reason. To support his argument the Respondent cited the case of Pascal Bandiho V Arusha Urban Water Supply & Sewerage Authority, Revision No. 76 of 2015 High Court Labour at Arusha A.C Nyerere J, held:- "...it is trite law that any termination of employment must be accompanied by fair reasons. This is clearly provided under section 37(2) of Employment and Labour Relation Act. No. 6 of 2004... the intention of the above provision is to ensure employer terminates employees only with valid reasons and not at their own will or whims." The respondent went on explaining that, the applicant did not follow appropriate termination procedure as the respondent was not given the notice of termination, neither letter of explanation on the allegation(s) nor notice of hearing was issued to respondent before hearing. It was respondent's argument that the hand written notes titled "minutes of hearing" by applicant did not bear Respondent's signature also did not reveal the name of the chairperson of the hearing committee, members, witnesses, and the evidence adduced. The respondent stated further that he was initially terminated verbally on 23rd October, 2018 by the Applicant and was told to leave the work place but surprisingly on 25th October 2018 he was issued with termination letter without being heard. The respondent further argued that, the applicant neither paid the respondent's terminal benefits nor compensation for unlawful termination which is contrary to section 44(l)(a)(b)(c)(d)(e)(f), (2) and 40(l)(c) of Employment and Labour Relations Act No. 8 of 2006 and Rule 4(4) of Employment and labour Relations (Code of Good Practice) G.N No. 42 of Rules 2007 which provides that;- "Section 44(1) (c)...On termination of employment an employer shall pay an employee
 - (a) Any remuneration for work done before termination
 - (b) Any annual leave pay...
 - (c) Any annual leave pay accrued...
 - (d) Any notice pay...
 - (e) Any severance pay...
 - (f) Any transport allowance...
- (g) On termination the employer shall issue to an employee a prescribed certificate of service... 7 Finally, the Respondent prayed for this Honourable Court to dismiss the Application with costs. In his brief rejoinder the applicant reiterated his submission in chief and maintained his prayer that the application be dismissed with costs. Having gone through the submissions of both parties and records from the Commission I think the issue for determination is whether this application for revision is meritorious. The law is settled to

the effect that termination of an employment contract must be for a fair reason substantively and procedurally. In determining whether termination due to misconduct is fair or not the court or CMA has to take cognizance the provisions of Rule 12 (1) of the Employment and Labour Relations Act (Code of Good Practice) which provides as follows; "Rule 12 (1) Any employer, arbitrator or judge who is required to decide as to termination for misconduct is fair shall consider;-

- a) Whether or not the employee contravened a rule or standard regulating conduct relating to employment;
 - b) If the rule or standard was contravened , whether or;
 - i) It is reasonable ii) It is clear and unambiguous; iii) The employee was aware of it, or could reasonably be expected to have been aware of it; iv) It has been consistently applied by the employer; and
 - v) Termination is an appropriate sanction for contravening it. In the present matter the main reason for respondent's termination was carrying an unauthorized cargo. However, It is on record the fact that the applicant's case crumbled for failure to produce original evidence (primary evidence) as required by the law. On termination procedure the law is clear as stipulated under Rule 13 (1) up to 13 (10) of the Employment and Labour Relations (Code of Good Practice) GN No. 42 of 2007 (the Code) and of paramount the right to be heard. "Rule 13 (1) The employer shall conduct an investigation to ascertain whether there are grounds for a hearing to be held . 9
- (2) Where a hearing is to be held , the employer shall notify the employee of the allegations using a form and language that the employee can reasonably understand
 - (3) The employee shall be entitled to a reasonable time to prepare for the hearing and to be assisted in the hearing by a trade union representative or fellow employee. What constitutes a / reasonable time shall depend on the circumstances and the complexity of the case, but it shall not normally be less than 48 hours.
 - (4) The hearing shall be held and finalized within a reasonable time and chaired by a sufficiently senior management representative who shall not have been involved in the circumstances giving rise to the case.))
 - (5) Evidence in support of the allegations against the employee shall be presented at the hearing. The employee shall be given a proper opportunity at the hearing to respond to the allegations, question any witness called by the employer and to call witnesses if necessary.
 - (6) Where an employee unreasonably refuses to attend the hearing, the employer may proceed with the hearing in the absence of the employee. xgwK 10

- (7) Where the hearing results in the employee being found guilty of the allegation under consideration, the employee shall be given the opportunity to put forward any mitigating factors before a decision is made on the sanction to be imposed.
- (8) After the hearing, the employer shall communicate the decision taken and preferably furnish the employee with written notification / of the decision, together with brief reasons.
- (9) A trade union official shall be entitled to represent a trade union representative or an employee who is an office - bearer or official of a registered trade union, at a hearing. I
- (10) Where employment is terminated, the employee shall be given the reason for termination and reminded of any rights to refer a dispute concerning the fairness of the termination under a collective agreement or to the Commission for Mediation and Arbitration under the Act. In the instant application it is on record at page 30 of the Commission's typed proceedings the fact that upon reporting back from the journey on 23/10/2018 the respondent was handed over termination letter without accorded the right to be heard which is without doubt that the applicant failed to discharge its duty of ensuring fair termination procedure. ii In Civil Application No. 33 of 2002 - Abbas Sherally and Another Vs. Abdul Fazalboy, the Court went further and observed "The right of a party to be heard before adverse action or decision is taken against such party has been stated and emphasized by the courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice." f This position was also fortified in case of Leopard Tours Ltd V. Rashid Juma& Abdallah Shaban, Lab. Div. Revision No. 55 of 2013 LCCD 2014 at page 22, where it was held inter alia that; "Rule 13 of the Employment and Labour Relation Act (Code of Good Practice) G.N 42 of 2007 provided clearly the procedures of terminating employee. Basing on the above provision and record of CMA it is without doubt that the applicant failed to discharge his duty to prove that the termination was a fair one procedurally..." 12 For the reasons discussed above, I have no hesitation to come to the conclusion that Respondent's termination was procedurally unfair and the Commission did not fault in holding the same and this ground alone suffices to dispose of the Application. More so I feel that it is not necessary to dwell on discussing the remaining issues. Consequently the application for revision is hereby) dismissed and the Commission's Award is upheld. This being a Labour dispute, I give no orders as costs. It is so ordered. 13

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