

TANZANIA / JUDGMENT

eddyluther festo natai and another v sbc tanzania limited 2024 tzhc 411 25 january 2024

COURT
TZHCDECIDED
25 January 2024

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA ARUSHA SUB REGISTRY
(LABOUR DIVISION) AT ARUSHA REVISION APPLICATION NO. 20 OF 2023 (C/F Dispute No. CMA/
ARS/ARS/153B/20/18/21) BETWEEN EDDYLUTHER FESTO NATAI..... Ist
APPLICANT DANIEL NNKO.....2nd APPLICANT VERSUS SBC
TANZANIA LIMITED..... RESPONDENT

JUDGMENT

25/10/2023 & 25/01/2024 MWASEBA, J. Dissatisfied by the decision of the Commission for Mediation and Arbitration (CMA) in dispute No. CMA/ARS/RS/153B/20/18/21, the applicants have filed this application seeking for revision of the CMA proceedings and award to satisfy itself as to the correctness, legality, or propriety of the proceedings and orders made therein. He further prays for the same to be quashed and set aside. h Page 1 of 11 The application is supported by the joint affidavit of the applicants and the same was opposed by the counter affidavit of the respondent's counsel Ms. Neema Oscar. Briefly, the applicants alleged that they were employed by the respondent as driver cum sales on different years and they were terminated following the allegations of theft and fraudulent of stores documentations. Aggrieved by the decision of the respondent, the applicants referred the matter to the commission claiming for unfair termination, and prayed to be awarded 15 months compensation, one month salary in lieu of notice, 2019 leave and clean certificate of service. Unfortunately, the CMA decision did not please them so they preferred the present revision before this court based on following legal reasons:

1. Whether the award is improper for failure to consider the evidence, reasons and arguments adduced by the applicants in the Commission for Mediation and Arbitration thus arriving to unfair and unjustifiable decision.
2. Whether the Arbitrator's award was based on his preconceived opinion without considering the reasons and evidence adduced by the applicants. Page 2 of 11 During the hearing, the applicants appeared in person, unrepresented whilst Ms. Neema Oscar, learned counsel represented the respondent. With the leave of the court, the hearing was done by way of

written submission. Submitting in support of the application, the applicants argued that they agree with the decision of the CMA at page 12 of the award that the termination was procedurally unfair but they disagree with the decision of awarding them with only a certificate of award and no other relief as prayed. Regarding the substantive fairness, it was their submission that Exhibit D6 and D7 did disclose the reasons for their termination apart from Exhibit D3. It was their further submission that the respondent did not request any submission of their certificate for verification, hence the offence of forgery was just an afterthought and baseless. They added that the respondent failed to prove that there was an issue of theft and fraudulent of stores documentation which they were called for at the disciplinary hearing. Thus, the issue of failure to submit certificates as raised by the Arbitrator was contrary to Section 37 (2) (a) of the Employment and Labour Relations Act, Cap 366 R.E 2019 as it was never deliberated at the disciplinary hearing. Page 3 of 11 They submitted further that the issue of the verification of their certificates as per Article 17 (a) of their contract of Employment to be the reasons of their termination was just an own conceived opinion of the Arbitrator and it was wrong for their termination to be based on the reason of failure to verify their certificates at National Examination Council of Tanzania (NECTA), thus the same was not gross misconduct as NECTA did not call for their certificates for verification. As for the issue of relief, the applicants submitted that they were not paid their terminal benefits as per Section 44 of Cap 366 R.E 2019 but the CMA did not take into consideration the act which was immoral and illegal. Thus, they prayed to be given their terminal benefits following procedural unfairness as per Section 40 (1), (a), (b) and (c) of Cap 366 R.E 2019 and the decision of the CMA to be quashed and set aside. Opposing the application, Ms. Neema responded to the 1st issue that the CMA did evaluate and considered the evidence submitted before it. She added that the letter to show cause (Exhibit D3) which was served to the applicants shows their offences and that they were required to submit their original certificates and they failed to do so. Ms. Neema submitted further that even at CMA they filed a notice on 22/4/2022 for the CMA to compel the applicants to submit their original certificates but they failed Page 4 of 11 to comply, which proved they forged their documents contrary to item 17 of the personal information in their employment contract. It was her further submission that as per Exhibit D3 the applicants were informed regarding the issue of their certificates and what to do. Thus, Hon. Arbitrator decided based on the evidence submitted before him and not otherwise. She added that the misconduct which were conducted by the applicants were insubordination, failure to obey a reasonable and lawful order and misappropriation of company's property. She said further that the decision of the Hon. Arbitrator was a reasonable one and justifiable based on the reasons submitted before the CMA. Submitting in respect of the issue of reliefs, Ms. Neema argued that the applicants were paid their terminal benefits as evidenced by exhibit D6 "Outcome of the Disciplinary Hearing". Thus, as the applicants put their signature on the said exhibits claiming the said relief at this stage is an open lie which cannot be entertained by this Hon. Court. She concluded that as the applicants were informed about their offences and they were given a chance to defend themselves, thus, there is no reasons submitted for this court to revise the decision of the CMA. She prayed for the CMA's award to be confirmed. Page 5 of

11 In brief rejoinder, the applicants reiterated what was submitted in their submission in chief and added that Exhibit D7 was not part of the proceedings at the disciplinary hearing, and they saw it at the 1st time before the CM A, they prayed for the same to be disregarded. They cited the case of Enza Zaden Africa Limited v. Edwin Kasena, Civil Appeal No. 427 of 2021 (CAT at Arusha) to support their arguments. Having gone through the submissions made by the applicants and the counsel for the respondent together with the records of this application, this court will now determine the merit of the application based on the following issues:

1. Whether the arbitrator was justified to hold that the applicants' termination was based on fair reasons.
2. Whether the arbitrator was correct to award the applicants with only certificate of service after the decision that some of the procedures were not followed.
3. What relief do parties entitled to. Starting with the 1st issue, in arriving to its decision, the CMA based its findings on the disciplinary hearing where the applicants were charged with two misconducts which are theft and Fraudulent of stores Page 6 of 11 documentation. The arbitrator went on holding that during hearing the applicant failed to defend themselves regarding the allegation put forth at the disciplinary hearing. It was therefore the finding of the commission that the offence of theft and fraudulent of stores documentation which caused loss to the respondent were proved and also the act of failure to submit their original certificate violated paragraph 17 (a) of their contract of employment. Section 37 (2) of the Employment and Labour Relations Act, Cap 336 R.E 2019 is very clear that it is the duty of the employer to prove that reasons for termination were on valid reasons. In the matter at hand, it should be noted that the employer did prove that he had valid reasons to terminate the employment of the applicants as evidenced by exhibit D5 collectively which shows that the applicants were found guilty on the charged offences. I am aware that it is the disciplinary hearing which initiate the whole process of termination of the employee's employment, however, the disciplinary hearing alone is not the only evidence that can be relied on to hold whether the employee was either fairly or unfairly terminated. The employer has a duty to prove that termination was fair both substantively and procedural. i) Page 7 of 11 Going by the records of the CMA, the applicants were terminated on reasons of theft and fraudulent of stores documentation together with their failure to submit original certificate to be verified by the NECTA. The applicants in giving evidence testified that the issue of their academic certificates was not one of the grounds charged at the Disciplinary hearing hence it was wrong for the CMA to rely on such ground to prove the valid reasons of termination. However, having gone through the records it is clear under Exhibit D3 (notice to show cause) apart from stating their offence the applicants were also required to submit their original certificates for verification as per paragraph 17 (a) of their employment contract, but the applicants failed to comply with such requirements which creates doubts if they real have the said certificates or not. Therefore, Hon. Arbitrator was correct to hold that submission of original certificates was a contractual obligation and it was not from his own

opinions. Basing on the said evidence, this court do agree with the hon arbitrator that the respondents had valid reasons to terminate the employment of the applicants. The second issue is whether the arbitrator was correct to award the applicants with only certificate of service after the decision that some of the procedures were not followed. In his award, Hon. Arbitrator held that Page 8 of 11 all the procedures of hearing at the disciplinary hearing were followed as required under Rule 13 of the Employment and Labour Relations (Code of Good Practice) GN 42 of 2007 except for the act of Exhibit D6 (Outcome of the Disciplinary Hearing) to be signed by another person instead of the Chaiman who presided during the Disciplinary hearing. He argued further that the said act denied the applicants the right to file an appeal at the higher authority. Revisiting the records of the CMA, this court agree with Hon Arbitrator that all the procedures under Rule 13 of GN 42 of 2007 were adhered to except for the outcome of the disciplinary hearing form to be signed by the Human Resource officer instead of the person who chaired the meeting. However, in my considered view, the said act did not deny the applicants the rights to appeal to higher authority if they wished to do so. As for the issue of being given investigation report, Rule 13 (1) of GN 42 of 2007 need an employer to conduct investigation but it does not compel the same to be served to the applicants. As for the issue of final benefits, it was the decision of the Arbitrator that the applicants were already given their entitlements, so what they deserve is only a clean certificate of service. Page 9 of 11 After going through the proceedings and decision of the CMA this court noted that as per Exhibit D6 the applicants were entitled to be given one month in lieu of notice, salary up to 11th March, 2020, outstanding leave of 28 days, incentives if any and a certificate of service. Further the said exhibit alleged that the Finance Manager will deduct any outstanding as may be revealed in their financial records. However, no prove was submitted to show that the applicants were paid the said entitlements and if there is any deduction which was made as per Exhibit D6. As for the issue of incentives the same was not proved by the applicants as it was well decided by the Hon. Arbitrator in his award. For those reasons the 1st applicant is entitled for the following reliefs:

- a) One month salary in lieu of notice Tshs. 605,913/=
- b) Salary of 11 days of March 2020 Tshs. 237,996/=
- c) Leave of 28 days for 2019 Tshs. 183,000/=
- d) Certificate of Service. The 2nd respondent is entitled for the following reliefs:
 - a) One month salary in lieu of notice Tshs 546, 500/=
 - b) Salary of 11 days of March 2020 Tshs 214, 500/=
 - c) Leave of 28 days for 2019 Tshs 183,000/=
 - d) Certificate of Service. Page 10 of 11 For the afore said reasons, the revision is partly allowed to the extent explained herein above. It is so ordered. DATED at ARUSHA this 25th day of January, 2024. N.R. MWASEBA JUDGE Page 11 of 11

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