

TANZANIA / JUDGMENT

REVISION APPLICATION NO 7 OF 2024

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA LABOUR DIVISION AT ARUSHA
REVISION APPLICATION NO. 7 OF 2024 (Originating from Labour Dispute No. CMA/ARS/
ARS/043/20/29/20) FRANCIS SHENYANGWA..... APPLICANT
VERSUS MOBISOL UK LIMITED..... RESPONDENT

JUDGMENT

26th August & 1st November 2024 Masara, J The Applicant brought this Application under the provisions of sections 91(1)(a) & (b), 91(2)(b) & (c), 91(4)(a) & (b) and 94(1)(b)(i) of the Employment and Labour Relations Act, Cap, 366 [R.E 2019], Rules 24(1), 24(2)(a), (b), (c), (d), (e) & (f), 24(3)(a), (b), (c) & (d) and 28(1)(a), (b), (c), (d) & (e) of the Labour Court Rules, G.N No. 106 of 2007. The Application seeks to challenge the decision of the Commission for Mediation and Arbitration of Arusha at Arusha ("the CMA") which dismissed his claim for unfair termination against the Respondent herein in Dispute No. CMA/ARS/ARS/043/20/29/2Q. To appreciate the gravity of the Application, a brief background to the dispute is essential. At the CMA, the Applicant instituted a labour dispute 1 | Page challenging his termination by the Respondent from employment. According to the complaint filed at the CMA, the Applicant pleaded unlawful termination of employment. At the CMA, it was the Applicant's case that he was summoned and attended a disciplinary hearing organised by the Respondent on allegations of dishonesty, major breach of trust and insubordination, as a first count, and dishonesty and wilful negligence in performance of work as the second count. Following the disciplinary committee hearing, the Applicant was terminated from his employment. The Applicant further alleges that the said termination is unfair as the Applicant never violated any procedure, policy or law of the Respondent. In response, the Respondent contended that the Applicant's termination was fair, in accordance with good grounds and followed procedure prescribed by the labour laws. Before the CMA, issues for determination were whether the Applicant was an employee of the Respondent; whether the procedure for termination of employment were adhered to and for which reliefs each party was entitled to. Incidentally, hearing at the CMA proceeded ex parte as the Respondent and its advocate defaulted appearance. Notwithstanding that the matter was heard ex parte, the CMA was not appeased to hold for the Applicant. 2 | Page Based on the evidence supplied by the Applicant, the CMA arbitrator held that the allegations of unfair termination were not proved to its satisfaction. The CMA ruled that the Respondent had valid reasons to terminate the Applicant and that the procedure for termination was complied with. The CMA thus dismissed the dispute

for want of merits. It is against that determination by the CMA that the Applicant has preferred this Revision Application. The Application is by way of chamber summons supported by an Affidavit. The Respondent opposed the Application by filing a Counter Affidavit deponed by Meinrad Menino D'Souza, the advocate for the Respondent, and a Supplementary Affidavit deponed by one Godfrey Mugabi, the Respondent's managing director. At the hearing, Mr Allen Godian, learned Advocate, while Mr Meinrad Menino D'Souza, also learned advocate, appeared for the Respondent. In support of the Application, Mr Godian prefaced his submissions by providing a historical background of the dispute leading to the current Application. He stated that, the Applicant was an employee of the Respondent as head of marketing department in a two-year contract commencing from 10th December 2018 to 9th December 2020. That, on 11th December 2019 he received a termination letter from the Respondent 3 | Page on allegations of wilful negligence and dishonest. Thereafter, the Applicant preferred the matter to the CMA claiming for unfair termination. The CMA ruled against his favour; hence the current Application. The challenge to CMA award is on two grounds. Expounding on the first ground, Mr Godian stated that there was no any valid reason for the termination of the Applicant by the Respondent. That, the reason advanced by the Respondent is failure of the Applicant to consult the Managing Director before confirming that the marketing department had enough funds to cover the Sales department activities. In the Applicant's view, confirming that there were enough funds did was not an abrogation of any rule as it was the duty of the Sales department to prepare a work plan and seek approval from the managing director and then go to the accountant for payments. Mr Godian added that, since it was not the Applicant's department which requested the funds, then the requesting department was to seek the approval from the managing director and not the Applicant herein. That in case of mismanagement of funds, then the requesting department and the accountant are the ones responsible. Submitting on the second ground for the revision, which is to the effect that the procedure for termination was not followed, Mr Godian argued 4 | Page that, there was no investigation conducted by the Respondent before conducting the disciplinary hearing as required by law. That the employer has to conduct investigation to ascertain whether there is any ground for the hearing to be held against the accused employee. He made reference to Rule 13(1) of the Employment and Labour Relation (Code of Good Practice) Rules, G.N No. 42 of 2007 and the decision of Huruma H. Kimambo vs Security Group (T) Limited, Revision No. 412 of 2016 to back up his argument. That, failure to conduct investigation was fatal and renders all the procedure null and void. Further, the Applicant's Counsel impugned the action of the Respondent's officer who acted as the prosecutor in the disciplinary hearing; that she acted both as a prosecutor and a witness at the same time. This was one Veronika Kahama who, being a prosecutor at the disciplinary hearing also tendered exhibits M1 to M4 as seen in exhibit CD3 the disciplinary hearing. That by tendering the said exhibits, she ipso facto became a witness. Lastly, Mr Godian alleged that the Applicant was not accorded the right to be heard in the Appeal stage as there was no any hearing conducted at the Appeal stage, thus denying the Applicant the right to be heard. Mr Godian finalised by praying that the Application be granted and the 5 | Page Applicant be paid TZS 84,000,000/=, being 12 months' salary for the remaining period of his employment contract. In reply, Mr D'Souza preceded his submissions by impugning the action of the CMA arbitrator to proceed with the

hearing ex parte. He contended that, despite being notified that the advocate for Respondent was unwell on the date of hearing, the CMA proceeded to determine the matter ex parte denying the Respondent the right to be heard. He went further to submit that, when the matter proceeds ex parte the burden of proof shifted to the Applicant. He cemented the position with the decision in Simon Daniel & Another vs Ngorongoro Oldean Mountain Lodge, Labour Revision No. 58 of 2020 and section 110 of the Evidence Act, Cap 6. Responding to the first ground of Revision, Mr D'Souza submitted that there were valid reasons necessitating the termination of the Applicant, as was held at page 5 of the CMA award. He also made reference to the decisions in Platinum Credit Limited vs Martin Joakim (Civil Appeal No. 138 of 2022) [2023] TZCA 17740. and National Bank of Commerce Limited vs Sady Mwang'onda, Revision Application No. 232 of 2023. He added that, the Applicant was accused of a serious misconduct and dishonesty deserving an outright termination as per Rule 6 | Page 12(2) and (3) of G.N No. 42 of 2007. For him, the budget holder is the person who was responsible to seek the approval from the managing director owing to the fact that he had a duty to explain the use and utilization of the funds. Countering the second ground, Mr D'Souza responded that the claim that the Applicant's termination did not follow the right procedure is untrue. That, the issue was not raised at the CMA, thus raising it at this stage makes it to be an afterthought. To buttress his position, he referred to the decisions in Elias Mosses Msaki vs Yesaya Ngateu Matee [1990] T.L.R 90 and Sospeter Kahindi vs Mbesi Mashini, Civil Appeal No. 56 of 2017. On the issue of not conducting investigation prior to the disciplinary hearing, the learned advocate for the Respondent submitted that the investigation was conducted before the disciplinary hearing, whose minutes were admitted as exhibit CD3. That, it is in the disciplinary hearing that the investigation report was tendered and admitted in evidence and that there was no objection raised both at the disciplinary hearing and before the CMA. He made referred to the case of Elias Mosses Msaki {Supra}. Mr D'Souza distinguished the decision Huruma H Kimambo_(S/7/ra) relied upon by the Applicant, on the ground that in 7 | Page that case no investigation was done while in this case an investigation was done prior to the conduct of the disciplinary hearing. Responding to the allegations that the prosecutor acted as a witness before the disciplinary hearing, Mr D'Souza stated that a disciplinary committee is a quasi-administrative body which is not bound by strict rules of procedure. That in the said hearing, the Applicant did not suffer any prejudice as he was given the right to be heard and ask question to the Respondent's witness. That in both the disciplinary hearing and appeal stage, the Respondent adhered to the principles of natural justice. He thus prayed that the Application be dismissed. The above summed the case for both sides. After a thorough scrutiny of the record of the CMA, the Affidavit for and against the present Application and the rival submissions made by Counsel for both parties, the issue for this Court's determination is whether the Applicant was lawfully terminated from his employment as held by the CMA. To answer the above issue, a number of considerations have to be made. One of those considerations arise from the contest on who had the burden to prove whether termination of the Applicant was fair or otherwise. Section 37 of the Employment and Labour Relations Act, Cap, 366 requires that termination of an employment contract must be for a fair reason; 8 | Page that is, substantive fairness and must follow fair procedures. Section 37(2) of the Employment and Labour Relations Act provides as follows: "A termination of employment by an employer is unfair if the employer fails to prove,

- a) That the reasons for termination is valid;
- b) That the reason is a fair reason related to the employee's conduct, capacity or compatibility, or based on the operational requirements of the employer; and
- c) That the employment was terminated in accordance with a fair procedure." The section has been dealt with by our Courts. For example, in the case of Tanzania National Parks Vs. Hamis Koio Mndulu, Labour Rev. No. 73 of 2015, Nyerere, J, (unreported) it was held as follows: "The established principle under section 37(2) of the ELRA was that no termination is permissible in law if it does not follow a fair procedure, the said principle was rooted from Article 7 of the ILO termination of Employment Convention No. 158.1982 which became operational on 23rd November, 1985." Generally, the burden of proof in labour matters lies on the employer to demonstrate that the employee was fairly terminated and the procedure of termination was followed. That is per Section 39 of the Employment and Labour Relations Act, Cap. 366. However, where a dispute is heard in the absence of the employer, the burden shifts to the employee to 9 | Page prove on preponderous of evidence that the termination was unfair. In other words, whereas, the general rule of evidence is to place the burden of proof on the person who alleges the existence of certain fact, that general rule applies with modifications in labour matters. In this Country, general issues of burden of proof are governed by section 110 of the Evidence Act Cap. 6 [R-E 2019]. In labour matters, the same is specifically dealt with by section 60(2) of the Labour Institutions Act, Cap. 300 [R.E 2019] which states: "In any civil proceedings concerning a contravention of a labour law- fa) the person who alleges that a right or protection conferred by any labour law has been contravened shall prove the facts of the conduct said to constitute the contravention unless the provisions of subsection (l)(b) apply; and
- (b) the party who is alleged to have engaged in the conduct in question shall then prove that the conduct does not constitute a contravention." As stated hitherto, the Applicant claimed that he was unfairly terminated by the Respondent from his employment. The CMA where the dispute was referred to proceeded to hear the dispute ex parte owing to the absence of the Respondent. Thus, the Applicant adduced uncontroverted evidence to prove his claims. 10 | Page According to the letter terminating the Applicant, the termination was due to misconduct. Rule 12(3) of the Employment and Labour Relations (Code of Good Practice) Rules, G.N No, 42 of 2007 governs issues of misconducts which may lead to termination. These include gross dishonesty and gross negligence. These are the exact charges that led to termination of the Applicant as per the termination letter (exhibit CD-4). The Applicant was terminated due to misconduct; namely wilful negligence and Dishonesty. In the absence of the employer, the CMA arbitrator resorted into scrutiny of the Applicant's evidence. In the said evidence, the Applicant had included various documents which aimed at faulting the Respondent's decision. One of those documents included the Minutes of the Disciplinary hearing (exhibit CD-3). The evidence adduced by two witnesses for the Respondent (DW1 and DW2) during the disciplinary hearing reveals that there was fraud that was committed within the company which led to the conduct of investigation. The Applicant who headed

one department was accused of failure to consult and get the approval of the managing director before funds could be utilised by another department. Seeking approval, according to those witnesses was the norm, but the Applicant contravened the same. 11 | Page

Exhibit CD-I, the employment contract, among many other things directed that the Applicant shall report directly to the Managing Director and that acts of gross misconduct shall lead to the termination of employment. That is per item 13 of Exhibit CD-I. It was the Applicant's defence both at the disciplinary hearing and at the CMA that it was not his responsibility to seek for the Managing Director's approval given the fact that the Head of Sales Department is the one who required the requested money for camping purposes. His role was merely to approve that money which was in his docket could be utilised for the requested purpose. He was exonerated on the first count of dishonesty, major breach of trust and insubordination by the disciplinary committee. He was, however found liable of dishonesty and wilful negligence in the performance of work. It is not apparent how the disciplinary committee was able to exonerate him in one count of dishonesty and convict him in the other count which also contained dishonesty in its content. In dismissing the Applicant's claim at the CMA, the CMA arbitrator reasoned as follows: "Kosa la uaminifu ni kos ana dosari kubwa Sana katika mahusiano ya kiajira kosa hili Hnaondoa Imani na uvumiiivu kati ya mwajiri na na mwajiriwa, ni moja ya makosa makuu yaliyomo katika fungu ia utovu wa nidhamu (misconduct gross (sic)) iinaoweza kuthibitisha 12 | Page

uachishaji kazi ndani ya masaa 24... Hivyo ni wazi mwajiri alikuwa na sababu ya msingi kuchukua hatua aliyochukua kwani Hikuwa halali." The learned arbitrator underlined the offences under Rule 12(2), (3)(a), (b), (c), (d) and (e) of the Employment and Labour Relations (Code of Good Practice) Rules, that he thought were relevant to justify the termination of the Applicant; namely, gross dishonesty, gross negligence and gross insubordination. He did not attempt to expound why he thought those offences had been proved against the Applicant. Looking at all the documents submitted by the Applicant, one wonders how the arbitrator could reach such a verdict, more so when the Respondent did not offer evidence to substantiate any of those underlined offences. The Arbitrator also erred in his analysis of the Respondent's financial policy. Both at the disciplinary hearing and before the CMA, there was no explicit policy availed concerning the seeking of approval from the Managing Director. It is evident that, other than the said non approval by the Managing Director, there was nothing levelled against the Applicant in the disciplinary hearing minutes or the investigation report. The policy relied to by the chairman of the disciplinary hearing is an email directed to the Head of Sales and copied to other officers, including the Applicant herein. That email stated as follows: 13 | Page "halo Mongolia as requested before, I would appreciate if these request (sic) are consolidated on your end and send one approved sheet to cover all areas or zones approved by you and Francis with MD sign off for payment before it gets into Jakob". As earlier stated, this email is considered to be the policy that was breached by the Applicant. The Imprest Request Forms attached to the Investigation Report required four signatures; namely, the employee requesting; the Manager/Chief Officer approval; CEO Approval and Group CEO approval. The Applicant signed in the Manager/Chief Officer part. Below him there were two other signatures. Looking at this process, one

would not hesitate to agree with the Applicant that he genuinely believed that the other approvals were to be appropriately sought by the end user, the Sales Department director. Thus, the reasons given for his termination appear to be wanting. The Respondent was charged and terminated for gross dishonesty, however, the two witnesses who testified for the Applicant at the disciplinary hearing did not, in my view, prove the dishonesty alleged. From the above, I do not agree with the CMA arbitrator's finding that the reasons for termination were valid, fair or genuine. I thus vary the finding of the arbitrator in that regard. It is my finding that the Applicant managed 14 | Page to prove that his termination was not based on valid or fair reasons. It was patently unfair. Regarding the fairness of the procedure for termination, the same is governed by Rule 13 of the Employment and Labour Relations (Code of Good Practice) GN No. 42 of 2007. The rule requires the investigation to be conducted before terminating an employee and in this matter the disciplinary hearing (exhibit CD-3) reveals that an investigation was done on the allegations. This led to the issuance of exhibit CD-4, the Chargesheet and the notice to attend the disciplinary hearing where claims against the Applicant were laid down. With those facts, the claim that there was no investigation lacks basis. However, although there is no dispute that the Respondent was given adequate notice of the disciplinary hearing and that the same was conducted, there was no proof that the investigation report that led to his being charged was supplied to him in advance. Further, looking at the alleged report, one wonders how the same was used to institute the charges against the Applicant as it bears no recommendations and is rather inconclusive. Be it as it may, the fact that the Respondent was not served with the report before he was called to defend himself, makes the procedure for his termination unfair. 15 | Page There is yet another abrogation of the hearing process in that the Applicant did not hear the accusations and evidence against him before he entered his defence. The Minutes of the hearing indicate that the Applicant entered his defence before the witnesses for the Respondent testified. That is to say, the Applicant was required to enter his defence even before the Respondent's witnesses testified in order to lay down facts constituting the offences against him. Further, as he claimed, the investigator tendered evidence instead of using the Respondent's witnesses, DW1 and DW2. This modus of hearing must have affected the Applicant. Thus, the procedural aspects of his termination were equally flouted. Having determined that the Applicant's contract was unfairly terminated both substantively and procedurally, it behoves me to determine what remedy is available to the Applicant. In the case of Magnus K. Laurean vs Tanzania Breweries Limited, Civil Appeal No. 25 of 2018 (unreported) it was held thus: "Generally, where the termination is adjudged unfair on procedural grounds only, an arbitrator or the High Court, Labour Division will award compensation under section 40(l)(c) of the ELRA as opposed reinstatement or re-engagement under section 40(1)(a) and (b) respectively of the ELRA. But if the termination is held to be both substantively and procedurally unfair, it will be fitting to order 16 | Page reinstatement without loss of remuneration unless there are justifiable grounds for not doing so in terms of Rule 32(2) of the Labour Institutions (Mediation and Arbitration Guidelines) Rules, 2007, G.N. 67 of 2007 ("the Guidelines Rules')." In this Application, the Applicant did not, understandably, ask for reinstatement. He was in a fixed term contract

and his relationship with his employer appear to have been sour. He, instead, craved for compensation for unfair termination amounting to TZS 168,000,000/= comprising of 12 months salary of his remaining term in the contract, and 12 months salary compensation as provided for in Section 40(l)(c) of the Employment and Labour Relations Act, Cap, 366. In *Joakim Mwanikwa vs Golden Tulip Hotel*, Rev. No. 268 of 2013, Labour Division at Dar es Salaam (Unreported) it was held, inter alia, that: "Section 40 of the ELRA gives direction of the court to decide which amount to be paid as compensation and such discretionary powers should not be applied suo moto, but only when the complainant has indicated in CMA F.I the amount the claims as compensation. When an employer terminates a fixed term contract, the loss of salary by the employee for the remaining period of the employment contract of the unexpired term is a direct foreseeable and reasonable consequence of the employer's action." (Emphasis added) 17 | Page

Guided by the above, It is my determination that the Applicants entitlement to compensation ought not to exceed what would be due to him if he was allowed to finish his fixed term contract. Consequently, it is my finding that the Applicants termination was both substantively and procedurally unfair. I therefore direct the Respondent to pay him compensation for unfair termination. As the Applicant was in a fixed term contract, he should be paid compensation equivalent to the salary of the remainder of his contract. As there remained 12 months in his contract by the time of his termination on 11th December 2019, and considering his salary of TZS 7,000,000/= per month, the Respondent shall pay the Applicant a total of shillings eighty-four million only (TZS 84,000,000/=). This amount shall be paid within 30 days of this Judgment. I make no order as to costs. DATED and DELIVERED at ARUSHA this 1st day of November 2024 Y.B. Masara 18 | Page

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