

TANZANIA / JUDGMENT

jonas abel memurati vs balton tanzania communication limited 2023 tzhcld 1452 22 september 2023

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA LABOUR DIVISION AT PAR ES
SALAAM REVISION NO. 134 OF 2023 BETWEEN JONAS ABEL
MEMURATI..... APPLICANT VERSUS BALTON TANZANIA
COMMUNICATION LIMITED..... RESPONDENT

JUDGEMENT

Date of last Order: 25/ 08/2023 Date of Judgement: 22/ 09/2023 MLYAMBINA, 3 The Applicant urges this Court to fault the decision of the Commission for Mediation and Arbitration (herein CMA) delivered on 19/05/2023 in Labour Dispute No. CMA/DSM/ILA/510/21/17/2022. The dispute emanates from the following background: The Applicant was employed by the Respondent as a Driver on 01/01/2021. It is alleged that; the Applicant was assigned a task to deliver some papers to Tanzania Revenue Authority (herein TRA) by his operations Manager on 06/09/2021. That the Applicant refused to perform such task. Therefore, the task was reassigned to another employee. Following his refusal, the Applicant was given a letter to show cause why disciplinary actions should not be taken against him. That he tore it apart in front of other employees. Hence, the letter was sent to him through an email. His response being unsatisfactory, the Applicant was summoned to a disciplinary meeting held on 01/10/2021 whereby the Applicant was found guilty and issued with a warning letter. Aggrieved by the said sanction, the Applicant appealed to the Country Director on 15/10/2021. However, the disciplinary committee's decision was upheld. After being served with the appeal outcome, he acknowledged receipt of the same but refused to sign on the ground that the Country Director is one of his opponents. Again, following his refusal and many other allegations on 27/10/2021, the Applicant was required to show cause why disciplinary action should not be taken against him. He was therefore summoned to another disciplinary hearing conducted on 04/11/2021 where he was found guilty of gross insubordination. He was terminated from employment with effect from 19/11/2021. Aggrieved by the said termination, the Applicant referred the matter to the CMA which found the termination was fair both substantively and procedurally. Once more, the Applicant was dissatisfied by the CMA's Award. He therefore filed the present application and urged the Court to determine the

following

issues:

- i. Whether the Arbitrator was legally justified to hold that the Applicant was terminated fairly.
- ii. Whether the Arbitrator was legally justified for holding that the Complainant's termination adhered to termination procedures.
- iii. Whether the Arbitrator was legally justified for failure to evaluate the evidence before her. The application was argued by way of written submissions. Before the Court, the Applicant was represented by Mr. Elipidius Philemon, Learned Counsel whereas Mr. Odhiambo Kobas, Learned Counsel appeared for the Respondent. Arguing in support of the first ground, Mr. Philemon persuaded this Court to fault the CMA's Award by pointing out the irregularities occurred in the first disciplinary hearing. With due respect to his submission, I find no relevance to reproduce the same for the reasons which will be apparent later. Counsel Elpidius insisted that the Respondent failed to prove the reason for his termination. He stated that the Applicant was charged with gross misconduct -insubordination. On 26th October 2021, he declined and refused to accept the warning letter which was issued to him by the Country Director. Counsel Elpidius stated that the warning letter (exhibit D9) has no place where the Applicant was supposed to sign. He added that the warning letter was sent to him via an email. He further argued that as long as the document was sent through an email, it is presumed that it has reached to the receiver. He also contended that no company policy was brought before the CMA to prove that it is the company procedure to sign on the document or on the dispatch. Regarding the termination procedures, Mr. Philemon maintained that the same were not followed. That, the Respondent never conducted an investigation which is the requirement under Rule 13 of the Employment and Labour Relations [Code of Good Practice] Rules GN. No. 42 of 2007 (herein GN. No. 42 of 2007). He argued that the provision is coached in a mandatory way that the investigation has to be performed. He added that the allegation that the Applicant refused to accept the warning letter was never one of the charges raised in the Notice to show cause and the summons to appear to disciplinary hearing. According to him the charge in question was only raised during the disciplinary hearing thus, denying the Applicant the right to be heard. It was further contended by Counsel Elpidius that the Human Resource Officer, Peter Mwampondele issued the show cause letter, appeared at the disciplinary hearing to take minutes and prosecuted the matter, which makes him a Judge in his own cause. Counsel Elpidius added that no minutes and the outcome of the disciplinary hearing were brought before the CMA. He went on to contend that the Applicant was charged for refusing to accept the warning letter issued by Mr. Jonas Crause. However, the said person was never brought before the disciplinary hearing or CMA as a witness. He continued to submit that outcome of the disciplinary hearing was never brought before the CMA. Even the termination letter does not state the gross misconduct committed by the Applicant. In the upshot, Counsel Elpidius insisted that the Respondent had no valid reason to terminate him and the termination procedures were not followed. Hence, the CMA's Award be revised, and the Applicant be compensated as prayed in CMA FI. In response to

the first ground, Mr. Kobas urged the Court to disregard the Applicant's submission with respect to the first disciplinary hearing as it is misconceived. He went on to submit that there were no any anomalies in the first disciplinary hearing, that is why the Applicant did not prefer to refer a dispute to the CMA on that regard. It was Counsel Koba's submission that the second disciplinary hearing is a 5 stand-alone disciplinary hearing which was decided without looking at the validity or otherwise of the first disciplinary hearing. It was added that the issue of validity of the first disciplinary hearing was not an issue at the CMA thus, it cannot be an issue to be considered by this Court. As to the reason of termination, it was submitted that the Respondent proved on balance of probabilities that the reason was fair. He stated that the Applicant refused to sign the outcome of his appeal and the decision thereof as required by his Country Director as evidenced by exhibit D 11. Mr. Kobas went on to submit that; after the refusal to sign the Applicant was served with a show cause letter (exhibit D12) to explain why disciplinary measures should not be taken against him. Further, Mr. Kobas elaborated that the documents to be signed were sent to him via email for him to download, print, sign and sent them back to the Country Director for him to counter sign and place the same to the Applicant's personal file. He was of the view that the Applicant's act of deliberate refusal to sign is an offence of gross misconduct on insubordination warranting termination of employment as per Rule 9(4)(a) and 12(3)(f) of GN. No. 42 of 2007. Turning to the termination procedures, it was submitted that the Respondent followed procedures in terminating the Applicant. He stated that having committed the disciplinary offence, the Applicant was given show cause notice (exhibit D12) to respond as to why disciplinary action should not be taken against him. Later on, 01/11/2021 the Applicant was served with the notice to appear before disciplinary hearing which was conducted on 04/11/2021. The outcome of the disciplinary hearing was issued on 11/11/2021 and eventually on 19/11/2021 the Applicant was terminated from employment. Responding to the allegation of failure to conduct investigation, it was argued that each particular case has to be considered and decided on its own merit depending on the reason for termination. In support of his submission, Mr. Kobas relied to the provision of Rule 9(1) of the GN. No. 42 of 2007. It was explained that, in the matter at hand, there was no need of conducting investigation because the circumstances were very obvious and apparent. Thus, the Respondent properly exercised her discretion to dispense with the procedures as per Rule 13(11) of GN. No. 42 of 2007. It was further submitted by Counsel Kobas that the Applicant was terminated for refusing to sign the termination letter, the allegation which is featured in both the show cause notice and the charges/summons to appear before the disciplinary hearing. Regarding the allegation against the Human Resource Officer, it was submitted by Counsel Kobas that issuing the notice to show cause, summons to appear before a disciplinary hearing and act as a secretariat to take minutes does not make a person a judge on his own cause. He insisted that the hearing was heard by an independent Chairperson Mr. Gerald Muhema and other two independent Panelist Members. As regards the allegation of Mr. John to testify at the CMA, it was submitted that such submission is an afterthought. On the contention against the termination letter, it was submitted that there is no legal requirement on the law to state particulars of misconduct in the termination letter. Mr.

Kobas insisted that the termination procedures were adhered. He therefore urged the Court to dismiss the application. In rejoinder Mr. Philemon reiterated his submission in chief. I have dully considered the submissions of both parties. The contention on the first disciplinary hearing is not regarded by this Court as it is an afterthought, as rightly submitted by Mr. Kobas. Additionally, the first disciplinary hearing did not result into termination of the Applicant's employment contract. The second disciplinary hearing is a standalone hearing. Therefore, the allegation that the irregularities in the first disciplinary hearing vitiates the second disciplinary hearing lacks merit. The Applicant's termination resulted from the second disciplinary hearing after he refused to sign the termination letter. Hence, the hearing processes commenced afresh. To start with the first issue; whether the reason for termination was fair, it is the law's requirement that employers should only terminate employees on fair and valid reason. This is in accordance with Section 37 o f the ELRA (supra). In the application at hand, as reflected in the termination letter (exhibit D18), the Applicant was terminated for gross misconduct. In the matter at hand, the Applicant alleges that he was infringed the right to be heard because the offences charged at the disciplinary hearing were not included in the show cause letter. I have critically examined the records, it is revealed that the misconducts listed in the notice of disciplinary hearing (exhibit D12) are the same which appears in the notice to attend disciplinary hearing (exhibit 14) and they are the ones discussed during disciplinary hearing as evidenced by the hearing form (exhibit 15). The main misconduct resulted into the Applicant's termination is the allegation of refusing to sign a document from a Country Director. The Applicant strongly disputes such allegation. As narrated in the background of the dispute above, in the case there were two disciplinary hearings conducted against the Applicant. The first disciplinary resulted into issuing a warning letter (exhibit D9). The warning letter was sent to the Applicant through his email and he replied as follows as reflected in exhibit D 11: I have received it but I will not sign this document. I just knew the appeal would not be successful, because you are one of my opponents, the final decision maker is the law and not you, the company is not run for personal hatred. The wording of the above quotation is direct that the Applicant refused to sign the warning letter an act which amounts to gross insubordination as rightly charged by the Respondent. Again, during the disciplinary hearing, the Applicant was asked as to why he did not sign the warning letter. The response was that he believed the decision was not fair because he did the task assigned and went to TRA. It is my view that the Applicant's response indirectly admits that he refused to sign the warning letter served to him. Therefore, even if the Applicant felt that the first disciplinary results was wrong, he had no right to refuse to sign the warning letter served to 10 him. He was afforded the right to appeal and did accordingly. Thus, the Respondent as the employer had the right to punish him accordingly. Therefore, in the basis of the foregoing analysis, it is my view that, in the matter at hand, the Respondent had valid reason to terminate the Applicant on the ground of misconduct because he proved all the misconduct levelled against him. There was no relevance to list the misconducts in question in the termination letter as contested by the Applicant. Turning to the second issue on termination procedures, the procedures for termination on the ground of misconduct are provided under Rule 13 o f

GN. No. 42 of 2007. The Applicant alleges that no investigation was conducted in respect of the misconducts charged. The requirement to conduct investigation is as per Rule 13(1) (supra) which is to the effect that: The employer shall conduct an investigation ascertain whether there are grounds for a hearing to be held. In the matter at hand, I join hands with Mr. Kobas arguments' that each case has to be decided on its own circumstances. It is undisputed that in any allegation against the employee, the employer must conduct investigation. However, to the circumstances of this case, it is my view that no further investigation was required. As noted, the Applicant was served with a warning letter through his email and he refused to sign and responded the same through an email. Again, the Applicant sent another email complaining about the management of the company and the same was sent to all Respondent's staffs. Moreover, before disciplinary hearing was convened, the Applicant was afforded with the chance to respond to the allegations in question. Thus, no infringement of the right to be heard as claimed. I have also observed other termination procedures and they were duly followed. It should be noted that the termination procedures listed under Rule 13 (supra) are not meant to be adhered in a checklist fashion. What is important, is to ensure that the termination was fair and the right to be heard was observed. This is the Court's decision in numerous decisions including the landmark case of *Justa Kyaruzi v. NBC Ltd*, Revision No. 79 of 2009, Labour Division, Mwanza Sub Registry (unreported), where it was held that: What is important is not application of the code in the checklist fashion, rather to ensure the process used adhere to the basics of fair hearing in the labour context depending on the circumstances of the parties, so as to ensure the act to terminate is not reached arbitrarily. Admittedly, the procedure may be dispensed with as per Rule 13(12) of the Code." In the premises, I find all the termination procedures to have been adhered in the present application. Thus, the Applicant was fairly terminated from employment both substantively and procedurally. In the end result, I find the present application has no merit. The Respondent terminated the Applicant fairly both substantively and procedurally. Thus, the CMA's award is hereby upheld. The application is dismissed accordingly. It is so ordered. Y J. MLYAMBINA JUDGE 22/09/2023 Judgement pronounced and dated 22nd September, 2023 in the presence of the Applicant in person and Counsel Michael Kabekenga holding brief of Odhiambo Kobas for the Respondent. Right of Appeal

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