

TANZANIA / JUDGMENT

JUMA ALEX V

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA ARUSHA SUB REGISTRY AT
ARUSHA LABOUR REVISION NO. 43 OF 2023 (C/F Labour Dispute No. CMA/ARS/71/23/29/23)
JUMA ALEX..... APPLICANT VERSUS RED
EARTH LIMITED..... RESPONDENT

JUDGMENT

09/09/2024 & 27/09/2024 MWENDA, J.: The applicant herein JUMA ALEX prayed before this court to call and examine the record of all the proceedings of the Commission for Mediation and Arbitration for Arusha (herein CMA) in Labour Dispute No. CMA/ARS/71/23/29/2023, revise it and set aside the said award, was delivered by the Arbitrator on 26/06/2023 and, to issue any other relief this court may deem fit to grant. This application is supported by the affidavit sworn by the applicants himself. In opposing the application, the respondent, through his personal representative one Ebenezer M. RWABYO filed a counter affidavit. Page 1 of 15 For a better understanding of this application, I find it pertinent to briefly narrate the facts of this matter. It is on record that the applicant was employed by the respondent as a team leader- Boiler since the 1st day of November 2021 up to 17th January 2023 when his contract was terminated by the respondent herein. Aggrieved by the decision to terminate him, the applicant filed Labour Dispute CMA/ARS/ARS/71/23/29/23 before the Commission for Mediation and Arbitration (CMA) for Arusha complaining of unfair termination. The CMA entered an award in the respondent's favour after being satisfied that there was no unfair labour practice. While dismissing the application, the Hon. Arbitrator was also satisfied that the procedures adopted before terminating the applicant were complied with. Further aggrieved the applicant preferred this application. At the hearing of this application, Mr. KENETH SAMWEL OCHINA, learned counsel appeared for the applicant while Mr. EBENEZER M. RWABYO, the respondent's Legal & Human Resources Officer represented the respondent. At the request of the parties, the application was heard by way of written submissions. Each party filed its respective written submissions as scheduled Page 2 of 15 and ordered by this court. I commend both parties for their submission which will be considered during the determination of the grounds for revision. Starting with the 1st ground of revision, Mr. OCHINA submitted that the CMA did not consider the material irregularities in the whole process of terminating the applicant. He pointed out that the applicant was never given opportunity to be heard at the Disciplinary hearing called by the respondent other than only asking him to sign a proceeding which was already been filed. According to him,

the said procedure contravened Sections 61 and 62 (10 (a) of the Law of Evidence Act, Cap 6 R.E 2022 which emphasizes the facts to be proved by oral evidence, and rule 4 (6) of the Employment and Labour Relations (Code of Good Practice) GN No. 42 of 2007 which task the management to submit a proof of allegation against the employee. In his further submission the learned counsel submitted that despite the fact that the respondent's premises had a block fence, surrounded by security guard and electric fence with CCTV Camera, still nothing was submitted to support the allegations that the appellant carried a big gallons of stolen fuel, a failure which is contrary to the dictates of Section 110,111,112, 113 & 115 of the Evidence Act, Cap 6 R.E 2022. Page 3 of 15

Another irregularity pointed out by Mr. OCHINA is that the chairman of the disciplinary hearing against the applicant, one Mr. INNOCENT MANYASI (The in charge) was of the lower rank than that of the applicant who was the team leader. According to him he (Mr. Innocent) was reporting to the applicant herein. Further to that Mr. OCHINA asserted that most of the member to the disciplinary hearing were of lower rank than that of the applicant which entail insubordination on the part of the applicant. Again, the learned counsel submitted that the disciplinary hearing contravened Rule 13 (1) (4) and of GN 42 of 2007 as there is no investigation report which was tendered. On the same note, he submitted that the CMA's decision was not finalized within the reasonable time. In support to this point, he referred this court to several authorities including the case of TANZANIA RAILWAYS LIMITED V. MWIJUMA SAID, REVISION NO. 239 OF 2014. Responding to this ground, Mr. RWABYO submitted that the applicant is trying to mislead this court as he was given a notice on 10/01/2023 to attend disciplinary hearing on 13/1/2023, the proceedings which was signed on 16/01/2023 as evidenced by Exhibit P4 Collectively. He also asserted that the allegation that Chairman of the disciplinary hearing signed the Disciplinary hearing form before the meeting is just a hearsay evidence. He Page 4 of 15 * - > tan. , "QM ot lmiSr Bra< 0[WTOIK M© WAN DEVELOPMENTS & ANOTHER (CIVIL APPEAL 57 OF \W^T2CA 2B y.1 OCTOBER 2018) (TANZUI). Tv\ Y\s father submission W. R\N ABYO asserted that Rule 4 (6) of GN No. 42 ot 2.007 was compiled with ty the evidence from DANIEL PALLANGYO (an employee who was terminated b\ the applicant) who confessed that he gave the applicant. a gallons kerosene for the purpose of selling it. Regarding failure to tender evidence from CCTV camera in support of her claim, Mr. IhNABNO submitted that the respondent's premises has few points with cameras. According to him ty presenting the gallons of kerosene at the teanng, then Rule 13 W of GN 42 of 2007 was adhered to. Regarding the complaint that the chairman of the discipline., hearing was of the lower rank than his, Mr. RiNRBXO submitted that the same does not cart, an, weight. „e beieued that * « W »' 42 of 2007 was adhered to as the chairman was impadia. and was not -,ed in an, Issue giwng dse to the p,esent matter. Moteouer, he asserted that it is not true that the termination Since October 2022.Kcordin9 to him, that was the time when gen. started moating the aliegation spans, the appi.can. the respondent starve Page 5 of 15 herein. On the other he distinguished all the cases dted by the counsel for the applicant. I have revisited the CMA's records and noted that it is undoubted that the disciplinary proceedings committee against the applicant was a flawed process. Firstly, the Disciplinary Hearing Committee was not properly constituted. This is because the chairman of the same was of the lower rank than that of the applicant. Moreover, the members to the disciplinary hearing carried lower rank than that of the applicant which by itself entail insubordination against the applicant. As it was rightly submitted

by Mr. OCHINA, the respondent ought to have appointed a person of higher rank than that of the applicant to do away with any feeling of biasness as the chairman of the disciplinary hearing must be impartial. Regarding the complaint that the applicant was not accorded the right to heard, the CMA's record, particularly Exhibit P2 shows that the applicant was accorded such right to defend himself, thus, the said allegation is baseless. Regarding the 2nd ground for revision, Mr. Ochina complained that it was wrong for the CMA to conclude that the applicant was fairly terminated based on theft allegation which was never proved by the respondent. The learned Page 6 of 15 respondent before CMA to substantiate the claim for theft alleged to committed by the applicant as required by Rule 13 (5) of GN 42 of 2007 According to him, with Exhibit P4 collectively, the respondent planned to terminate the applicant since October 2022, way before the termination which occurred on 17/01/2024 contrary to Section 37 (1) & (2) (a) of the Employment and Labour Relations Act, Cap R.E 2019. In support to this point he cited the case of LEORNAD NDEGE V. TANZANIA TELECOMMUNICATION LTD (TTCL) REVISION NO. 32 OF 2014. Responding to this ground, Mr. RWABYO submitted that the provision cited by the learned counsel for the applicant in this ground governs the disciplinary hearing and not the hearing before the CMA. He added in that before the CMA, the applicant neither challenged the evidence of DANIEL PALANGYO nor denied having knowledge of the said gallons. More so, he said that in disciplinary proceedings, the elements of criminal responsibility are to be proved but not to the standards set in criminal cases. His assertion was supported by citing the case of DANIEL ASSEY PALLANGYO V. RED EARTH LIMITED, REVISION NO. 43 OF 2023. He concluded in that the Page 7 of 15 provisions of Section 11 and 113 of the Law of Evidence Act were adhered to by tendering exhibit P1 to P7. I wish to express my agreement with Mr. RWABYO's submission that it was the respondent's burden to prove that there was a valid reason for the applicant's termination. This is as per with Section 37 (2) of the ELRA, which stipulates thus: "37. -(1) It shall be unlawful for an employer to terminate the employment of an employee unfairly.

- (2) A termination of employment by an employer is unfair if the employer fails to prove-
 - (a) that the reason for the termination is valid.
 - (b) that the reason is a fair reason-
 - (i) related to the employee's conduct, capacity or compatibility; or (ii) based on the operational requirements of the employer, and
 - (c) that the employment was terminated in accordance with a fair procedure." Page 8 of 15
- Guided by the cited provision, it was the duty of the respondent to prove that the grounds for termination of the applicant's employment were valid. At the CMA, the respondent alleged that the applicant stole 30 liters of kerosene. To prove the allegation, she tendered Exhibit P2 (the Disciplinary hearing Form') and the witnesses were summoned to testify in that regard. However, none of the respondent's witnesses testified to have spotted the applicant stealing, let alone to be seen carrying the said item. The evidence tendered by the respondent's witnesses was hearsay from the person who was arrested with the said kerosene. Interestingly, the said person was not summoned before the CM A to testify as a witness.

Having keenly considered the facts of the case and the evaluation of the evidence by the arbitrator, although the standard of proof of criminal elements in matters such as the present is not beyond reasonable doubt, the fact that no witness saw the applicant stealing or carrying stolen item, and the failure by the respondent to summon the person who alleged to have received the stolen items from the applicant, leave me with one conclusion that the allegation of theft against the applicant was not proved by the applicant on that time this court find that there were no valid reasons to warrant the termination of the applicant herein. Page 9 of 15 “ ‘ h, M . , assuming the rw Wording to him the „ police ^s. ' 6 Ought to be reported at thp station and acquire an rr h < h Pol“ e°re he could be found guilty. He referred this “ “ “ “ TM ■«' •«. LTO „ REVISION NO. 01 OF 2020. On his part, Mr. RWABYO briefly responded to this ground in that the respondent did not assume the police powers and, they never charged the applicants with criminal act. He believed the applicant was never condemned unheard as evidenced by exhibit P1 to P5. I have considered this ground, and it suffice to say that failure to deal with an employee under the criminal law does not limit the employer from dealing with the employee administratively. Thus, this allegation is baseless and is hereby dismissed. Regarding the ground of appeal tte learned counsel for the applicant submitted thattt was wrong for the CMA to hoid that there was no unfair iabour prices committed against the appHcant Py me respondent, fn this grounds Mt. OCHWA repeated on what he pree»usly spotted rn hrs was Panned way back in October 2022 and that there was no proof of theft against the appiicant On his part Mr. RWABYO replied to the effect that the words which are quoted in the said form do not form part of the contents of decision for termination. He said the said document is in the standard form (Disciplinary Hearing Form SOP) used in all disciplinary hearing. He was of the view that applicant s argument does not carry any weight. This court will note delve much on this ground as the raised issues is already determined in the previous grounds for revisions. Regarding the complaint against the Disciplinary Hearing Form being dated in the month of October 2022 implying the disciplinary hearing was conducted in that month and year or the same was planned since October 2022,1 believe that is not the case because the said document is in a standard form and the respondent omitted to have it updated. That said, I find this ground unmerited and is hereby dismissed. Regarding the last ground of revision, the applicant complaint was that there are no reasons advanced by Hon. Arbitrator for his failure to pronounce his award within the time prescribed by the law. I n his submission Mr. OCHINA Page 11 of 15 dld nOt delVe On ground at all To th dLL To the contrary hp in applicant was unfairly terminated with ** that 37 (Tt r no reasonable 9roun<f as per s«, 37 (3) of CaP366 R. e 2019 HP al also added in that the award inappropriate contrary to Rule 32 (st nf, . 2 (5) of Labour Institutions (Mediation and Arbitration Gu.deiines) GN No. 67.He further submitted that the apptont as entitled to a proper compensation as per Section 40 (1) of Cap 366 r.e

2019. He supported his argument by citing the case of SECURITY GROUP (T) LTD V. MASHAKA SETEBE, REVISION No. 54 of 2017 and prayed for this application to be allowed. In reply, Mr. RWABYO submitted that the submission by counsel for the applicant does not support this ground. That notwithstanding. Mr. RWABYO replied in that the Hon. Arbitrator had a

discretion to manage his timetable and the CMA's decision was based on the evidence and exhibits tendered before it. Having considered the submissions from both sides on this ground, this court agrees with Mr. RWABYO that what is submitted by the learned counsel for the applicant does not support this ground of revision. This entail the said ground is abandoned. That notwithstanding, I found it apposite to briefly _ rtelavs ln delivering the award out of the prescribed time is not state tnai ueiay-» Page 12 of 15 fatal and that by itself cannot invalidate the award issued. Any such cannot form a ground of interfering with the CMA's decision. This stance finds support from the decision of the Court in the case of Tanzania BREWERIES LIMITED V. LEO KOBELLO, [2015] LCCD 49 where it was held inter alia that: - "In the case of 2000 Industries Ltd. Vs. Halima Z. Giteta & 7 Others, Rev. No. 9 of 2009, High Court at Dar es Salaam (unreported), the Court held that the award delivered outside of the required 30 days but the same did not cause any miscarriage of justice to the applicants as they failed to adduce any facts to show that they were unduly prejudiced as a result of non-delivery of the award within 30 days". See also the case of ERICK JOSEPH MNDEME VS AFRISIAN GINNING LIMITED (Revision Application 416 of 2022) [2023] TZHC 1272 (28 April 2023) (Tanzlii). Guided by the above decision and reasoning, I find no merit on this ground, and it is hereby dismissed. Page 13 of 15 In the end, based on the reasoning in the 1st and 2nd ground of revision this court is of the firm view that the termination of the applicant was both substantively and procedurally unfair. Thus, the decision of the CMA r hereby quashed and set aside. Having quashed the decision of the CMA, the applicant is now entitled to his rights as per Section 40 (1) (a) to (c) of the ELRA which provides that: "(1) If an arbitrator or Labour Court finds a termination is unfair, the arbitrator or Court may order the employer-

- (a) to reinstate the employee from the date the employee was terminated without loss of remuneration during the period that the employee was absent from work due to the unfair termination; or
- (b) to re-engage the employee on any terms that the arbitrator or Court may decide; or
- (c) to pay compensation to the employee of not less than twelve months' remuneration." In the circumstances of this matter, this court finds the option under Section 40(l)(c) above suitable. The applicant is thus awarded compensation of Page 14 of 15 lt \s so ordered. Page 15 of 15

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