

TANZANIA / JUDGMENT

omary awadh transport co vs mambo omary mambo 2024 tzhcld 30 7 march 2024

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IN THE HIGH COURT OF TANZANIA LABOUR DIVISION AT DAR ES SALAAM REVISION
APPLICATION NO. 28195 OF 2023 (Arising from an Award issued on 12/12/2023 by Hon. Massawe,
Y, Arbitrator, in Labour dispute No. CMA/DSM/MKR/30/2022/24/2022 at Mkuranga) OMARY
AWADH TRANSPORT CO APPLICANTS VERSUS MAMBO OMARY
MAMBO..... RESPONDENT

JUDGMENT

Date of last Order: 27/2/2024 Date of judgment: 7/3/2024 B. E. K. Mganga, J. Brief facts of this application are that, in 2009 Omary Awadhi Transport Co. Ltd, the abovenamed applicant employed Mambo Omari Mambo, the abovenamed respondent as a driver for unspecified period contract of employment. Place of recruitment of the respondent was in Morogoro. It happened that, after some years, applicant transferred the respondent to Kisamvule area within Mkuranga district in Coast Region where he continued to work as a driver. On 22nd August 2022, applicant terminated employment contract of the respondent, allegedly, that there was mutual agreement to terminate the said employment. On 31st August 2022, respondent filed Labour dispute No. 1 CMA/PWN/MKR/30/2022/24/2022 at Mkuranga complaining that applicant terminated his employment unfairly. In the Referral Form (CMA F1) respondent indicated that termination was unfair both substantively and procedurally. In the said CMA F1, respondent indicated that he was claiming to be paid 12 months salaries compensation for unfair termination, one month salary in lieu of notice, annual leave pay, severance pay and repatriation costs. On 12th December 2023, Hon. Massawe Y, Arbitrator having heard evidence of the parties issued an award that termination was unfair both substantively and procedurally. With those findings, the arbitrator awarded respondent to be paid (i) TZS 3,600,000/= being 12 months salaries compensation for unfair termination, (ii) TZS 61,384 severance pay as it was proved that respondent was initially paid TZS 746,308/= as severance pay, (iii) TZS 16,000/= as leave pay as it was proved that initially respondent was paid TZS 264,000/=(, (iv) TZS 16,000/= as less amount of notice pay, (v) TZS 4,710,000/= as subsistence pay from date of termination (22nd August 2022 to the date of the award 12th December 2023 and that the same will continue to accumulate until when respondent will be repatriated to Morogoro, (vi) TZS 288,000/= as transport cost of 1 tone luggage of the respondent from Mbagala to 2 Morogoro and (vii) TZS 26,000/= as fare of the respondent and his

spouse from Dar es Saalaam to Morogoro. When this application was called on for hearing, Ms. Irene Mushi, advocate appeared and argued for and on behalf of the applicant while Mr. Kapufi Yussuph Ally, advocate appeared and argued for and on behalf of the respondent. Ms. Mushi, advocate opted to argue the aforementioned six grounds collectively. Counsel for the applicant submitted that, respondent had unspecified term contract of employment from August 2008 but the same was terminated on 22nd August 2022. She added that, respondent prayed verbally to terminate his employment. She further submitted that, the arbitrator failed to analyze evidence particularly, termination agreement between the applicant and the respondent (exhibit D3) and minutes of the meeting (exhibit D2) in which the parties agreed to terminate employment. She went on that, the findings of the arbitrator that exhibit D3 was not signed by the respondent led to miscarriage of justice. Ms. Mushi also submitted that, the arbitrator erred to hold that exhibit D3 was void due to absence of the signature of the respondent and that the latter was not given right to be heard. She argued that the arbitrator had no justification to conclude that the agreement was invalid. In submissions learned counsel conceded that, in order to prove that there was agreement, there must be consent and that, consent can be proved by presence of signature of the parties. She was quick to submit that, at CMA, respondent admitted that he was paid terminal benefits that was based on mutual agreement termination letter. Learned counsel for the applicant further submitted that, the arbitrator erred to award respondent TZS 8,717,384/= that includes TZS 3,600,000/= compensation for unfair termination while termination was on mutual agreement. She further submitted that, procedures of disciplinary hearing that the arbitrator alleged were not adhered cannot apply because there was no any misconduct rather, termination was on mutual agreement. She went on that, respondent was not supposed to be awarded TZS 4,710,000/= as substance allowance because there was no unfair termination. In her submissions, counsel for the applicant conceded that, place of engagement of the respondent was in Morogoro but was terminated while at Mkurunga, Coast Region. Learned counsel rested her submissions praying that the application be allowed. Resisting the application, Mr. Ally, learned counsel for the respondent submitted that there was no agreement between applicant 4 and the respondent to terminate employment. He submitted further that, exhibit D3 was prepared by the applicant but the respondent was not involved. He added that, even in exhibit D2 there are names of the persons who attended the meeting and signed the said minutes, but respondent did not sign meaning that he did not attend. Learned counsel for the respondent submitted further that according to contract of employment(exhibit D1), place of recruitment is Morogoro, but respondent was thereafter transferred to Kisenvule area within Coast Region where he was terminated. Counsel for the respondent concluded that the arbitrator did not error and prayed that the application be dismissed for want of merit. In rejoinder submissions, counsel for the applicant submitted that, there was no duress at the time exhibit D2 and D3 were prepared but conceded that respondent did not sign exhibit D2 and D3. I have examined the CMA record and considered rival submissions of the parties in this application. It is clear in the CMA record that 23rd June 2023, three issues were drafted namely (i) whether the employer had valid reason to terminate employment of the employee, (ii) whether the employer adhered to termination procedures and(iii) to what relief(s) are the parties entitled to. In the bid to prove these issues, the 5 employer, the herein applicant called two witnesses namely Said Shaaban

Nyaa(DW1) who is the Human Resources officer and Shanes Kasian Nungu(DW2) the TUICO secretary at Mkuranga. On the other hand, mambo Omari Mambo(PW1) the employee, the herein respondent was the only witness on his side. It was evidence of Said Shaaban Nyaa(DW1) that, in 2009 applicant employed the respondent as driver and tendered employment contract as exhibit D1. He further stated that, in August 2023 respondent demanded to be given a new motor vehicle to drive but applicant had none. That, respondent demanded verballity to terminate his employment but after some discussions, a meeting was held on 22nd August 2022, as a result, the parties mutually agreed to terminate employment and tendered minutes of the said meeting as exhibit D2 and termination letter as exhibit D3. He further testified that respondent was paid one month salary in lieu of notice, leave and one month salary and severance pay. During cross examination, DW1 admitted that the minutes were not signed by the respondent. On reason for the said minutes not to be signed by the respondent, DW1 stated that, respondent refused to sign stating that he will sign upon payment of his entitlement. 6 It was evidence of Shanes Kasian Nungu(DW2), the TUICO secretary at Mkuranga testified that, there was a dispute between applicant and the respondent because the later was demanding to be given a new vehicle to drive like other drivers. DW2 testified further that applicant did not fulfil the demands of the respondent as a result a meeting was convened, and the parties agreed to terminate employment contract. In his evidence in chief, DW2 stated that, respondent did not sign the minutes and agreement to terminate his employment stating that he will only sign upon payment of his entitlements. Testifying under cross examination, DW2 stated that, the motor vehicle that respondent was driving had some challenges because a distance that other drivers take two days, respondent will take five days hence cost and loss to the respondent. On the other hand, it was evidence of Mambo Omari Mambo(PW1) the respondent that he recalls one day DW1 called him over the phone to go in DW1's office and that upon his arrival, DW1 gave him two documents and asked him not to read in his presence. That he went outside of DW1's office and upon reading, he noted that applicant has terminated his employment alleging that the two mutually agreed to terminate the said employment. PW1 stated that he did not participate 7 in the alleged meeting and further that there was not agreement to terminate his employment contract. It was further evidence of the respondent that applicant terminated his employment unfairly. In his evidence in chief, PW1 demanded to be paid TZS 3,000,000 as repatriation costs, TZS 3,600,000 being 12 months' salary compensation leave, and TZS 3,900,000/= as severance pay. I have considered the above evidence by the parties and in my view, there was no mutual agreement to terminate employment of the respondent. I am of that considered opinion because reading between the line evidence of both DW1 and DW2, there was a dispute between applicant and the respondent prior to the alleged meeting in which it was alleged that the parties agreed to terminate employment contract. It is the said dispute that culminated to termination of employment of the respondent. The allegation that the parties agreed to terminate employment contract is not supported by minutes of the alleged meeting. I have examined the said minutes (exhibits D2) and find that it purports to show that five people namely, (i) Said Shabani Nyaa(DW1) who was the chair, (ii) Amer Ali Swaleh(secretary), (iii) Shanes Kasian Nungu(DW2) member from TUICO, (iv) Annasia Ndeambilisia and Mambo Omary Mambo(PW1) the respondent. Exhibit D2 is titled 8 "KIKAO CHA MAADILI YA MFANYAKAZI MAMBO OMAR MAMBO KILICHOFAANYIKA KATIKA

OFISI ZA OMAR AWADHI TRANSPORT TAREHE 22/08/2022". It is my view that the alleged meeting was a disciplinary meeting against the respondent as the quoted heading suggest. It was not a meeting initiated to discuss how applicant and respondent can terminate employment mutually. Attached to the said alleged minute is a piece of paper titled " KIKAO CHA MAADILI YA MFANYAKAZI MAMBO OMAR MAMBO KILICHOFANYIKA KATIKA OFISI ZA OMAR AWADHI TRANSPORT CO LTD SIKU YA JUMATATU TAREHE 22.08.2022. The said piece of paper was signed by (i) Said Shabani Nyaa(DW1) who was the chair, (ii) Amer Ali Swaleh(secretary), (iii) Shanes Kasian Nungu(DW2) member from TUICO, (iv) Annasia Ndeambilisia only. Though Mambo Omary Mambo(PW1) the respondent is shown that he was amongst the people who attended the said meeting, there is no his signature. It is my considered opinion, as correctly held by the arbitrator, there is no proof that respondent consented mutually to terminate his employment because respondent did not sign exhibit D2. Not only that but also, respondent did not sign termination letter (exhibit D3) that 9 shows that termination of employment was by mutual agreement. It was, in my view, correctly conceded by counsel for the applicant that, in order to prove that there was agreement, there must be consent and that, consent can be proved by presence of signature of the parties. Therefore, in absence of signature of the respondent on the alleged minutes(exhibit D2) in which it was alleged that the parties mutually agreed to terminate their employment relation, it cannot be said or proved that employment contract of the respondent was terminated by mutual agreement. It was submitted that arbitrator did not analyze evidence especially exhibits D2 and D3 and that failure caused injustice to the applicant. With due respect to counsel for the applicant, from what I have pointed hereinabove relating to exhibits D2 and D3, the arbitrator cannot be faulted in holding that there was no agreement between the parties to terminate employment contract. Evidence of both DW1 and DW2 that respondent did not sign exhibit D2 is a proof that there was no agreement between applicant and the respondent. Therefore, since there was no agreement to terminate employment of the respondent, applicant was to prove fairness of reasons and procedures. Since in her 10 evidence, applicant did not prove that there was valid reason for termination, I find as the arbitrator did, that termination was unfair. For the foregoing, I hereby uphold the CMA award and dismiss this application for want of merit. Dated in Dar es Salaam on this 7th March 2024. B. E. K. Mganga JUDGE Judgment delivered on this 7th March 2024 in chambers in the presence of Catherine Kiiza, Advocate for the Applicant and Kapufi Yussuph Ally, Advocate for the Respondent. B. E. K. Mganga JUDGE 11

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Prepared on 14 October 2026 · Esheria