

TANZANIA / JUDGMENT

sada kimbendela vs mp exploration production t limited 2023 tzhcld 1466 19 october 2023

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IN THE HIGH COURT OF TANZANIA LABOUR DIVISION AT DAR ES SALAAM MISCELLANEOUS
APPLICATION NO. 202 OF 2023 (Arising from an Award issued on 31/07/2023 by Hon. Kiwelu, L,
Arbitrator, in Labour Complaint No. CMA/DSM/ILA/47/21/100/21 at Ilala) SADA KIMBENDELA
..... APPLICANT VERSUS M & P EXPLORATION PRODUCTION
(T) LIMITED RESPONDENT

JUDGMENT

Date of last Order: 26/09/2023 Date of Judgment: 19/10/2023 B. E. K. Mganga, J. On 31st December 2015, Sada Kimbendela, the herein applicant, signed a contract of employment for unspecified period with M & P Exploration Products (T) Limited, the herein respondent. In the said contract of employment, applicant was employed as Bookkeeper and the said employment was effective from 4th January 2016. It happened that a drop of lemon water entered the eyes of the parties as a result, respondent summoned applicant to attend the disciplinary hearing for two allegations namely, (i) fraudulent expense report and (ii) incompetence, inadequate and poor performance of duties. On 17th 1 August 2020, the disciplinary hearing committee found applicant guilty of fraudulent expense only as a result, on 6th January 2021, respondent terminated employment of the applicant. Applicant was aggrieved with termination of her employment as a result, she filed labour complaint No. CMA/DSM/ILA/47/21/100/21 before the Commission for Mediation and Arbitration henceforth CMA at Ilala complaining that she was unfairly terminated. In the Referral Form (CMA F1), applicant indicated that respondent had no valid reason for termination and further that procedures for termination were not adhered to. Based on that, applicant indicated in the CMA F1 that she was claiming to be reinstated without loss of remuneration and be paid TZS 100,000,000/= as general damages. On 31st July 2023, Hon. Kiwelu, L, Arbitrator, having heard evidence of the parties issued an award that respondent had a valid reason for termination hence termination was fair substantively but unfair procedurally. Based on procedural unfair termination, the arbitrator awarded applicant to be paid TZS 13,140,000/= being six (6) months' salary compensation. Further aggrieved, applicant filed this application seeking the court to revise the said award. In the affidavit in support of the Notice of application,

applicant raised five (5) grounds namely: - 2

1. That, the Honourable Arbitrator erred to issue an award that is not supported by evidence.
2. That, the Honourable Arbitrator erred in law and fact to hold that applicant committed fraud.
3. That, the Arbitrator erred in law and facts in awarding compensation that is contrary to the law.
4. That, the Arbitrator erred in law and facts by failure to note that there was gross violation of termination procedures.
5. That, Arbitrator issued an award which is illegal, irrational, illogical and improperly procured. Respondent filed the Notice of Opposition and the counter affidavit of Grace Shao, her principal officer to resist the application. When the application was called on for hearing, Mr. Evold Mushi, Advocate appeared and argued for and on behalf of the applicant while Ms. Beatrice Mrosso, Advocate appeared and argued for and on behalf of the respondent. In arguing the 1st and 2nd grounds, Mr. Mushi submitted that applicant's employment was terminated allegedly that she committed fraud. He went on that during Covid 19 pandemic, respondent's employees including applicant were not allowed to use public transport. That, based on that, applicant boarded a taxi from home to office and paid the taxi driver from her pocket fare to office and her return fare to home because it was during rain season, and she was pregnant. He went on that, applicant was entitled to be refunded by the respondent but upon presenting a return ticket, the respondent termed that action 3 as fraud because, at that time, she had not received service of the taxi driver from office to home. Learned counsel submitted that, evidence of DW1, the only witness for the respondent did not prove that applicant committed fraud. Mr. Mushi argued that, if respondent doubted payment done by the applicant, was supposed only not to refund the amount applicant paid by herself and not to terminate her employment. He argued that, respondent termed that payment as fraudulent transaction of which it was not. He submitted further that, Rule 9(2) of the Employment and Labour Relations (Code of Good Practice) GN. No. 42 of 2007 provides that, for termination to be fair, there must be a valid reason. Counsel for the applicant submitted further that, there was no dispute regarding genuineness of the ticket, but the issue was why did applicant pay for her return ticket before enjoying the service. He concluded that, there was no valid reason for termination. Arguing the 3rd ground, Mr. Mushi submitted that, the six (6) months' salary compensation awarded to the applicant is contrary to the provisions of Section 40(1) of Cap. 366 RE. 2019 which provides the minimal is 12 months compensation. In arguing the 4th ground, Mr. Mushi submitted that, evidence shows that there was gross violation of procedures for termination 4 contrary to what the arbitrator held that there was minor procedural nonadherence. He submitted further that; applicant was suspended to pave way for investigation but when she was called for hearing she was not served with the investigation report. He went on that, after conclusion of the disciplinary hearing, applicant was not served with termination letter

as a result, she continued to be under suspension for four (4) months. Counsel submitted further that, applicant appealed against termination of her employment, but the outcome of the appeal came out with new allegations which applicant was not charged with namely theft and breach of trust as shown in exhibit D6. Mr. Mushi submitted further that, in the disciplinary hearing (exhibit D4) applicant was called first to defend her innocence and thereafter respondent called witness to challenge what was testified by the applicant. He added that applicant was not given an opportunity to cross examine witnesses for the respondent. Learned counsel for the applicant opted not to submit on the 5th ground and prayed the court to allow the application by quashing and setting aside the CMA award and order respondent to reinstate applicant without loss of remuneration. Resisting the application on behalf of the respondent, Ms. Mrosso, learned advocate for the respondent, submitting on fairness of reason, submitted that respondent had a valid reason to terminate employment of the applicant. Ms. Mrosso submitted further that; applicant was terminated due to gross dishonesty based on the charge of fraudulent expenses report (exhibit D2). Counsel went on that; applicant inflated the amount she allegedly paid as taxi fare that was too high and for the service that she had not enjoyed. She concluded that termination was substantively fair. On procedural fairness, learned counsel for the respondent submitted that the award was properly issued. On the award of six months compensation, learned counsel submitted that the Arbitrator was justified to award applicant only six (6) months' salary compensation because termination was fair substantively. She, therefore, prayed the court to dismiss the application for want of merit. In rejoinder, Mr. Mushi submitted that, applicant was never charged for the count of dishonesty. I have examined the CMA record and considered submissions of the parties in this application and find that the main issue in this application is whether respondent proved validity of reason for termination of employment of the applicant. It was evidence of Raphael John Mbena (DW1), the only witness for the respondent that during Covid 19 pandemic, applicant submitted taxi receipts to her manager claiming to be refunded TZS 130,000/= as fare she paid on 22nd May 2020. DW1 testified further that, applicant's manager said that applicant was claiming to be refunded money for returning home in the evening, the service she had not enjoyed from the taxi driver. DW1 also testified that applicant's manager told applicant to use office vehicle. DW1 testified further that, it seems applicant was intending to obtain money fraudulently. When under cross examination, DW1 testified that on what he testified relating to validity of the receipts was according to information obtained from applicant's manager. DW1 admitted that applicant paid the taxi fare from her own pocket and that the taxi driver was not called to testify in the disciplinary hearing. In her evidence, Sada Hamidu Kimbendela (PW1), applicant stated that her manager permitted employees to use taxi during Covid 19 pandemic and claim for refund. She stated further that on 22nd May 2020 due to difficulties she was getting to get a taxi in the evening, she decided to pay the taxi driver fare from home to office and back expecting to use the same taxi driver in the evening. In her evidence, PW1 disputed to have committed fraud. From the foregoing evidence of the parties, I find that respondent did not prove validity of reason of termination. In other words, there is no evidence to prove that respondent had a valid

reason for termination 7 of employment of the applicant. My conclusion is two folded. One, evidence of DW1, the only witness for the respondent is hearsay based on information he obtained from applicant's manager who did not testify. That evidence cannot be acted upon by this court. It was an error on part of the arbitrator for his failure to scrutinize that evidence. Two, the particulars of the allegations of fraudulent expense report in the "call for a disciplinary hearing" (exhibit D3) reads: - "On 22nd May 2020, you presented an expense report of Tshs. 130,000 (sic) being reimbursement of taxi fares which you claimed to have incurred for return trips (home/office). However, the company was able to review the receipts provided and upon consultations with qualified third parties, it was established that the prices stipulated in each of the receipts were higher than the standard market price. Also, you provided an expense justificative for a trip which had not yet happened. Accordingly, before the disciplinary committee, you will be required to present your defence against such claims and show cause of why such expenses should not be categorized as fraudulent." (Emphasis is mine). It is clear from the quoted particulars of the alleged misconduct of fraud that, respondent indicated that she consulted "qualified third parties" and established that the prices stipulated in each of the receipts were higher than the standard market price. In his evidence at CMA, DW1 did not state that the prices in the receipts submitted by applicant for reimbursement were higher than the standard price. More so, nothing was mentioned as to the standard price. What is clear from 8 evidence of the parties is that, respondent formed an opinion on how to get rid of the applicant and the said allegations of fraud and poor performance were just a way to that end. My conclusion is based on what DW1 testified while under cross examination that, on 22nd July 2020, respondent informed applicant that she was under performing and will be terminated and further that she will be paid but applicant demanded a lot of money, as a result, negotiation failed. In his own words, DW1 was recorded stating that: - Swali- unakumbuka tarehe 22/07/2020 menejimenti ilimuita Sada ikamwambia ana makosa ya wizi na underperformance na wanataka kumuachisha kazi. Jibu- Nakumbuka. Swali- unakumbuka walimwambia watamlipa Sada kiasi fulani na Sada akaweka kiwango kikubwa na mazungumzo yakakwama. Jibu- Ndiyo. Swali- Hayo waliyokuwa wanazungumza ndiyo yaliyopelekea hatua za nidhamu? Jibu- Ndiyo." (Emphasis is mine) The quoted piece of evidence of DW1 while under cross examination shows that, that was on 22nd July 2020. That was a day before serving applicant with a call for disciplinary hearing (exhibit D3). It can be recalled that disciplinary hearing was conducted on 18th August 2020. 9 As discussed hereinabove, I hold that respondent had no valid reason to terminate employment of the applicant hence termination was unfair substantively. Respondent had a duty to prove the allegation of fraud, but she did not discharge that duty. It is settled law that, he who alleges must prove. See the case of Barelia Karangirangi vs Asteria Nyalambwa (Civil Appeal 237 of 2015) [2019] TZCA 51. On procedural fairness, the arbitrator found that respondent did not adhere to procedures for termination. In other words, the arbitrator agreed with the applicant. I see no justification for the applicant to challenge what was decided in her favour. In my view, the mere fact that the arbitrator held that there was minor noncompliance of procedural fairness while applicant thinks that noncompliance was

major, does not change anything. In fact, counsel for the respondent had no issue with procedural unfair which is why she supported the award that was fair. I have held hereinabove that termination was both substantively and procedural unfair. I therefore revise the CMA award. Applicant was awarded six months' salary compensation for only procedural unfair, but I have held that termination was both substantively and procedurally unfair. Therefore, the award of six months cannot stand. In the CMA F1 and in this application, applicant prayed to be reinstated without loss of remuneration. I therefore grant 10 that prayer and order respondent to reinstate the applicant without loss of remuneration from the date of this judgment. If respondent does not wish to reinstate the applicant, then, she must comply with the provisions of section 40(3) of the Employment and Labour Relations Act [Cap. 366 R.E. 2019]. In the up short and for the foregoing, I find that this application is merited. I hereby allow it and revise the CMA award to the extent explained. Dated at Dar es salaam this 19th October 2023 B. E. K. Mganga JUDGE Judgment delivered on 19th October 2023 in chambers in the presence of Ms. Linda Mafuru, Advocate for the Applicant and Beatrice Mrosso, Advocate for the Respondent. B. E. K. Mganga JUDGE 11

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