

TANZANIA / JUDGMENT

total tanzania ltd faustine bankana 2020 tzhcld 36 20 march 2020

COURT
TANZLIIDECIDED
20 March 2020

Source: media.tanzlii.org · Research copy typeset by Esheria. Not court-issued or certified.

IN THE HIGH COURT OF TANZANIA LABOUR DIVISION AT PAR ES SALAAM REVISION NO. 938
OF 2018 BETWEEN TOTAL TANZANIA L T D APPLICANT VERSUS FAUSTINE
BANKANA..... RESPONDENT

JUDGMENT

Date of Last Order: 05/02/2020 Date of Judgment: 20/03/2020 S.A.N. Wambura, 3. Aggrieved by the Award of the Commission for Mediation and Arbitration [herein after to be referred to as CMA] delivered on 10th September, 2018 the applicant total Ta n z a n i a ltd has filed this application under the provisions of Sections 91(l)(a)(b), (2)(b)(c) and 94(l)(b)(i) of the Employment and Labour Relations Act No. 6 of 2004 [herein after to be referred to as ELRA] and Rules 24(1), (2)(a)(b)(c)(d)(e)(f), (3)(a)(b)(c)(d) and 28(l)(a)(b)(c)(d)(e) of the Labour Court Rules, GN No. 106 of 2007 praying for the following Orders:-

1. That this Honourable court be pleased to call for records, examine and revise the proceedings, award and orders of the Commission for Mediation and Arbitration in Labour Dispute No. CMA/DSM/KIN/R. 169/16/464 by Hon. Mwaikambo, K.V. Arbitrator, dated 10th September, 2018.
2. That this Honourable Court be pleased to make any other further orders as it may be just and convenient in the circumstance of the case. The application is supported by the sworn affidavit of m arsha m s u y a the Applicant's Principal Officer. The respondent fa u stin e bankana challenged the application through the counter affidavit of learned Counsel Nsajigwa Bukuku Advocate. The background of the dispute in brief is that the respondent was employed by the applicant as a Lubricant Supervisor as of 01/07/2007. He was promoted to the rank of Supplies Manager a post he held up to 02/02/2016, when he was terminated from employment due to negligence. Aggrieved by the decision, the respondent referred the matter to CMA. CMA found in his favor. Dissatisfied by the CMA's award the applicant has now knocked at the doors of this Court. At the hearing the applicant was represented by Mr. Emmanuel Nasson learned Advocate whereas the respondent was represented by two Learned Counsels, Mr. Bukuku and Mr. Koyugi Advocates. With leave of this Court the matter was disposed of by way of written submissions. I thank both parties for adhering to

the schedule and for their

submissions.

Mr. Nasson prayed for the affidavit of MARSHA MSUYA to be adopted to form part of their submissions. He argued on the seven grounds to the effect that:-

1. The Hon. Arbitrator erred in law by holding that the applicant failed to prove that there were sufficient reasons for terminating the respondent's employment, on the ground that the product was stored at other depots without cost consideration and approval of Managing Director. This led to unnecessary hospitality cost for the applicant's Company at other Oil Marketing Companies. That the loan or borrow requests were not approved by the authorities concerned as per the internal procedures of the applicants Company as evidenced by Exhibit C9 (Borrow Loan Request Form) tendered at CMA. He further argued that a significant amount of loan or borrow purchase orders were not closed in SAP (Enterprise Resource Planning Software Systems) as per Exhibit C-5 (Response to Charge Sheet). The respondent admitted to an offence leading to stock difference and closure of Purchasing Order led to unplanned losses. That the imagination stock transfer without SAP (Enterprise Resource Planning Software System) could be construed as an attempt to falsify stock balances.
2. The Hon. Arbitrator erred in faulting the applicant's action of serving the respondent with a letter to show cause and fixing a hearing date. He argued that the Hon. Arbitrator misconceived that the applicants action to act in bad faith, contrary to the legal requirements under Rule 13 of the Employment and Labour Relations (Code of good Conduct), GN No. 42 of 2007 which provides for the notice to be in a form and language that the employee can reasonably understand.
3. The Hon. Arbitrator erred in holding that the applicant had failed to adduce evidence during disciplinary proceedings. He argued that it is on record that evidence was adduced. The evidence of the applicant was the same as that of the respondent but the Hon. Arbitrator ruled that the applicant should not rely on what is adduced by the respondent.
4. The Hon. Arbitrator erred in holding that the respondent was not given an opportunity for mitigation and the omission was so serious. He alleged that the respondent was given an opportunity to mitigate as evidenced by Exhibit C-5 (Explanation against Charge Sheet), at the last paragraph.
5. The Hon. Arbitrator erred in holding that the applicant had failed to prove that the procedure for terminating the respondent was fair. He argued that the respondent does not dispute that he was given sufficient notice to attend the disciplinary hearing. That hearing was conducted and he was given an opportunity to be heard but he chose not to tender the Disciplinary Hearing Form which shows how the hearing was conducted.

6. The Hon. Arbitrator seems to have been influenced by the fact that there was a bad relation between the respondent and one Winston Faulkner (Operation Manager) while in fact there was no such evidence. He argued that Rule 5 (a) and (b) of the Labour Institutions (Ethics and Code of Conduct for Mediators and Arbitrator) Rules, GN. No. 66 of 2007 which provides that the Hon. Arbitrator in course of discharging his duties, he is required to act impartial, with due diligence to be independent of any outside pressure was not observed.
7. The Hon. Arbitrator erred to order the applicant to reinstate the respondent while in fact the nature of the offence and circumstances of the case warranted for other reliefs such as payment of compensation. That it is on record that the respondent had caused great loss to the applicant as evidenced by Exhibit R-1. The loss was never disputed by the respondent who actually agreed that there was a loss due to his acts. Under such circumstances of causing loss of more than Tshs. 4,465,557,632/= it made the employer employee relation intolerable. He thus prayed for the application to be allowed. Responding to the said grounds, the respondent submitted that:-
 1. The applicant was denied his right to rely on any Exhibits produced before CM A because they are not part of the application for revision. They submitted that the applicant did not produce the disciplinary charge sheet (Exhibit C-4) or any documentary evidence to support charges. That even DW1 and DW2 did not tender documentary or testimonial evidence to establish the procedure and reasons of employment termination. It was further argued that according to Section 39 of the Employment and Labour Relation Act, No 6 of 2004, it is the duty of the employer to prove that termination was fair and not the employee. That at page 9 of CMA's award, the arbitrator made a finding that the employer did not produce evidence to prove any valid reason and fair procedure for termination of employment.
 2. That fair procedural practice require the employer (applicant), to first to conduct investigations then take written explanation from the employee and subsequently charge the employee in case of any findings. They argued that by charging and fixing the date of disciplinary hearing it shows the employer had a preconceived position to charge and fire the employee without considering his written explanation. In the circumstances, the right of the respondent to fair procedure was accordingly breached.
 3. The applicant did not produce disciplinary charge sheet, written explanation of employee, minutes of disciplinary committee or even termination letter to support employment offences. As for the Loan Borrow Request (Exhibit C-9) has ten (10) forms for loan borrow requests and the respondent gave evidence that all ten
- (10) forms had been approved by the Operations Manager (OM), In fact, even the form dated 29th April, 2015 was approved on the Margin on the same date.
4. The applicant did not tender the minutes of the Disciplinary hearing before CMA to prove that mitigation was conducted. Thus, CMA did not consider the applicant's oral testimony that mitigation opportunity was given to respondent.

5. Linder Section 37(2) (a) (b) and (c) of Employment and Labour Relation Act, No. 6 of 2004 termination of employment is unfair if the employer fails to prove that the reason for termination was valid and fair and a fair procedure for termination was adhered to. Thus if termination of employment relates to poor work performance, the employer was bound fully to comply with Rule 17(1) of the Employment and Labour Relation (Code of Good Practice) Rules, GN. No. 42 of 2007 but the applicant failed to observe this rule. They further argued that paragraph 9 of the affidavit sets out a number of unproven factual allegations to justify charge of job negligence in that;
- a) The respondent stored product in other depots without approval of Operation Manager (OM) and Managing Director (MD). They argued that the employer did not produce evidence on any internal rules which required the respondent to obtain their approval. The respondent adduced evidence that he was reporting only to the Operation Manager. Further the respondent stated that storage at Oilcom Tanzania was less costly than at Tipper on the ground that Tipper had no loading gantry.
 - b) On allegations that significant amounts of loan & borrow POs (purchase orders) were not closed in the SAP system. They argued that the SAP refused to collect some orders due to mismatch between kilograms and litre units. SAP receives the product in kilograms but issued them out in litres and the one who had authority to collect mismatch in the SAP is the Finance Manager. That failure to close SAPs was due to price fluctuation and technical difficulties.
 - c) In respect of the allegation that the respondent made fictitious stock transfers in the SAP with a view of falsifying stock balance, they argued that it was the dispatch team which could make stock transfers as evidenced by Exhibit C.10. The respondent was on supply team dealing with stock reconciliation at the SAP.
 - d) As for the stock reconciliation with other oil marketing companies was not done systematically, they argued that the employer did not produce any internal rule or policy binding the respondent to undertake daily stock reconciliation or monthly.
 - e) As for the allegation that the loan borrow request were not approved by the authorities concerned as per internal rules of the applicant, they argued that no such rules were produced before disciplinary committee or at CMA. In fact, such rules did not exist, and that no documentary evidence of loan/borrow requests issued without approval were produced before CMA. 10
6. That the employer did not follow a fair procedure because the reason of termination as stated in the termination letter is different from the charge sheet as evidenced by Exhibit C-3 (letter of termination). The reason for termination was job negligence and Exhibit C-4 (Disciplinary Charge Sheet) the respondent was charged with gross misconduct. They further argued that the respondent was not given fair opportunity to improve his work performance prior to termination. There was no evidence showing the respondent was given appropriate guidance, instructions and training to facilitate better work performance

prior to termination.

7. That an order of reinstatement was justifiable. It is a statutory reliefs, the law does not compel the employer to reinstate an employee he may opt to compensate him as provided for under Section 40(l)(c) of Employment and Labour Relation Act, No. 6 of 2007. They thus prayed for the application to be dismissed. What this Court is called upon to determine is:- ii (i). Whether or not the applicant had a valid reason for terminating the respondent. (ii). Whether the applicant adhered to the procedures in terminating the respondent. (iii). The reliefs entitled to the parties.
1. Did the applicant have a valid reason for terminating the respondent? The validity and fairness of the reason for termination is covered under Section 37 (2) of ELRA which provides that:- "Section 37 (2) A termination o f 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 o f the employer." [Emphasis is mine], 12 The intention of the legislature in the cited Section is to require employers to terminate employees on valid reasons and not on their own whims. This is also the position of the International Labour Organization Convention (ILO) 158 of 1982 under Article 4, which provides:- "Artic/e 4: The employment o f a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct o f the worker or based on the operation requirements o f the undertaking, establishment or services. " [Emphasis is mine]. From the above legal position, it is a well established principle of law, that once there is unfair termination the duty to prove the reason for termination was valid and fair lies upon the employer and not employee. This is per Section 39 of ELRA and as held in the case of Geoffrey R. Kasambula Vs. Total Tanzania Ltd, Rev. No. 280 of 2018. In the present matter it is undisputed that there was insufficient space for storage of products at the applicant's premises, that is why they 13 opted to store the same at TIPPER or OILCOM TANZANIA LIMITED. At page 34 of CMA's award the respondent explained why he opted to store products at OILCOM so as to reduce the running cost on the ground that TIPPER had no loading gantry. That it costed 11 USD per 1000 litres while OILCOM charged 10 USD per 1000 litres including loading gantry cost. DW1 and DW2 did not tender any Rules or Policies at CMA to support the allegation of non-approval in storing the product at other depots. On the issue of not connecting purchase orders (POs) with SAP (Enterprise Resource Planning), the applicant also failed to tender rules or policies at CMA to show how the applicant was responsible for SAP. However, the respondent tendered Exhibit CIO (e-mail from Internal Auditor addressed to the dispatch team for stock transfer in SAP) indicating that the dispatch team was responsible for stock transfer in SAP. Further DW1 and DW2 failed to tender any Audited Financial Report so as to establish when the loss occurred. That is whether it was at

the time when the respondent was in service and or before his services were terminated so as to connect the respondent with those offences including financial loss. 14 It has been submitted that Exhibit R1 was proof of the loss which was occasioned by the respondent. I have had an opportunity of going through it. I have however failed to relate with the respondents negligence because:- (i). It is unknown as to who prepared the TTL Stock Sheet and who verified it. (ii). The Stock Reconciliation Sheet was allegedly prepared by Norbert Bernard, Stock Controller and was reviewed by Jamila Alnofly - Distribution Manager but it was not signed. (iii). In all the three documents the respondents name does not appear. Nor does he agree to cause the loss. (iv). The same applies to an untitled document approved by Winston Faulkner Operations Manager and Oliver Cursente Control Manager. The employer is expected to consider some other factors in terminating an employee on the ground of poor work performance as per Rule 17 of ELRA (Code of Good Practice) GN No. 42 of 2004 which provides that:- 15 "Rule 17(1) Any employer, arbitrator or judge who determines a whether a termination for poor work performance shall consider-

- a) whether or not the employee failed to meet a performance standard.
 - b) whether the employee was aware, or could reasonably be expected to have been aware of the required performance standard
 - c) whether the performance standards are reasonable.
 - d) the reason why the employee failed to meet the standard
 - e) whether the employee was afforded a fair opportunity to meet performance standard" [Emphasis is mine]. Therefore a first offender needs to be warned and trained on his work performance as per Rule 17(l)(e) of ELRA (Code of Good Practice), which provides a fair opportunity to meet the performance standard. 16 In this matter the applicant did not tender any rules or policies at CMA, which were vital for the respondent to be aware, to meet the standard, reasonability and opportunity to meet the performance expectations. All these were not observed by the applicant, hence triggered to unfair termination. It is my view therefore that there was no valid and fair reason for terminating the respondent for the challenges which were also noted by the applicant.
2. Did the applicant adhere to the procedures in terminating the respondent? Section 37(2)(c) of ELRA provides that:- "Section 37 (2) A termination o f employment by an employer is unfair if the employer fails to prove-
- (c) that the employment was terminated in accordance with a fair procedure." [Emphasis is mine]. Ingredients for fair disciplinary hearing were also discussed in the case of NBC Ltd Mwanza v. Justa B. Kyaruzi, Revision No. 79/2009 HC Labour Division Mwanza Sub Registry (Unreported) where it held that:- 17 "Ingredients of fair hearing are the right to be made aware of the charge, and given reasonable time to prepare and be heard in defense; an opportunity to cross examine employers witness (the accusers) and in the context of the act, the right to be assisted at the hearing by a union representative or a friend what is important

is not an application of the code in the checklist fashion, rather to ensure the process used to adhere to basics of fair hearing in the Labour Content depending on the circumstances of the parties, so as to ensure the act to terminate is not reached arbitrarily." [Emphasis is mine]. In the present matter, it is on record that the procedure for termination was observed as evidenced by Exhibits C4 to C7. The allegation that the applicant failed to tender the hearing form does not mean that hearing was not conducted. The Exhibits tendered by the respondent proved the same. It is obvious therefore that the procedures were adhered to. A disciplinary hearing was conducted and the 18 respondent got an opportunity to appeal. This proves that there was a fair procedure in terminating the respondent's employment and it cannot be said that there was procedural unfairness, as it was held in the case of *Justa Kyaruzi* (supra). He was served with the charges, heard and was found guilty. In complying with Section 37(l)(c) it has been stated that it does not have to be in checklist fashion as it was held in the case of *NUMET Vs. North Mara Gold Mine Ltd*, Rev. No. 6/2015. I thus fault the Arbitrator's findings that there was unfair termination of the respondent and procedurally. This is because the procedures were adequately adhered to. As for the allegation of that Rule 5 (a) and (b) of GN No. 66 of 2007 had been contravened I believe the same has not been proved by the applicant.

3. What are the reliefs entitled to parties? The remedies available for unfair termination are stipulated under Section 40 of ELRA which provides that: - 19 "Section 40 (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 [Emphasis is mine]. CMA found that the respondent was unfairly terminated both substantively and procedurally, and Ordered the respondent to be reinstated as prayed for in CMA Form No. 1. 20 However, I have found that the procedures for termination were adhered to. Moreover the post may be filled by now apart from having souring working relations. I thus revise CMA's award and Order that the applicant pays the respondent the following:- (i). The respondent's terminal benefits (if he was not paid). That is:-
 - One month's salary in lieu of notice Tshs. 4,246,858/ = .
 - Leave if not paid i.e Tshs. 4,246,858/ = .
 - Severance pay being Tshs. $4,246,858/26 \times 7 \times 8$ = Tshs. 9,146,079/ = . (ii). Compensate the respondent eight (8) months' salary only ie. Tshs. $4,246,858 \times 12$ = Tshs. 33,974,864/ = . The respondent is thus entitled to be paid a total Tshs. 51,614,659/= only if the terminal benefits were not paid. Application is allowed to that extent. S.A a 21

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE	https://media.tanzlii.org/media/judgment/155252/source_file/total-tanzania-ltd-faustine-bankana-2020-tzhcld-36-20-march-2020.pdf
CASE PAGE	https://chat.esheria.ai/case-law/tanzania/total-tanzania-ltd-v-faustine-bankana-unfairtermination-tanzlii-2020

Prepared on 13 October 2026 · Esheria