IN THE HIGH COURT OF THE UNITED REPUBLIC TANZANIA

[LABOUR DIVISION]

AT ARUSHA

REVISION APPLICATION NO. 94 OF 2019

(C/F Labour Dispute No. CMA/ARS/ARB/148/2017)

PERFECT SILVESTER MOSHA ..... APPLICANT

Versus

R.C. TRUCKING (T) L.T.D ..... RESPONDENT

JUDGMENT

23rd March& 27th April, 2021

Masara, J.

Perfect Silvester Mosha, the Applicant, was employed by the Respondent as a Driver in July 2016 (April, 2016 according to the Applicant). He was not given a written contract but was to be paid TZS 350,000/= per month. On 8th April, 2017 while driving from Mtwara to Songea, the vehicle he was driving was damaged. He called his employer, through one Rajesh Chandarana (PW1) asking him to send him spare parts for the vehicle. There ensued arguments whether the damage to the vehicle was due to an accident but the Applicant maintained that it was a break down. Spare parts were sent to the Applicant by the Respondent whereby the Applicant managed to mend the vehicle and continued with the journey. The Applicant was later told to refund the money amounting to TZS 4,700,000/= which was for the spare parts sent to him by the Respondent. Furthermore, the Respondent did not pay the Applicant the salaries for March, April and May 2017. The Applicant decided to prefer a claim for unfair termination before the Commission for Mediation and Arbitration for Arusha Region (hereinafter the "CMA") in Labour dispute No. CMA/ARS/ARB/148/2017.

At the hearing, the Respondent maintained that the Applicant was not terminated but he absconded from work. The Respondent further stated that a decision to require the Applicant to reimburse the Respondent was reached in a disciplinary hearing which the Applicant did not attend despite efforts to require him to attend the hearing. The Applicant, on the other hand maintained that he was orally terminated when he was told not to go back to work unless he agreed to reimburse the company the money expended to repair the vehicle he was driving. The learned Arbitrator dismissed the claim for unfair termination. He agreed with the respondent that the Applicant was not terminated but left work. He advised that the Applicant *"reports back to work to continue with his duties subject to adherence of his contract, company policies and other lawful instruction by the employer".*

The CMA decision did not please the Applicant hence this Application. The Application is supported by the Affidavit of Frank Lawrence Maganga, a personal representative of the Applicant. It is grounded on the following issues:

(a) *That the Arbitrator erred in fact and in law by holding that the Applicant was not terminated but he left himself from work despite there was no proof what action the respondent took for that misconduct or abscondment;*

(b) *That the Arbitrator erred in fact and in law by holding that there was a fair disciplinary hearing while the Applicant did not being (sic) informed about any hearing, the respondent failed to prove that he served the notice of hearing to the Applicant;*

(c) *That, the Arbitrator errored (sic) in fact and in law by not consider (sic) that the respondent cheated (sic) the Commission that she was looking for the applicant in order to serve the notice for hearing but she did notfound (sic) him while there was no proof and no reasons for ex parte disciplinary hearing; and*

(d) That the Arbitrator erred in fact and in law by holding that there was an accident reported by Applicant while the Applicant never reported an accident but the vehicle has got breakdown.

Based on the above grounds, the Applicant urged this Court to vary the judgment of the Commission and set aside the award. The Respondent vehemently objected the Application by filing a notice of opposition and a counter affidavit attested by Emmanuel Sood, advocate for the Respondent. At the hearing, the Applicant was represented by Mr. Frank Maganga, Personal Representative, while the Respondent was represented by Mr. Emmanuel Sood, learned advocate. The Application was heard by filing of written submissions.

Submitting on the first issue Mr. Maganga faulted the CMA's decision for not deciding that the Applicant was orally terminated on 11th May 2017 when he refused to refund the money for the spare parts. That the Respondent maintained that the money was spent due to the Applicant's negligence. Mr. Maganga maintained that even if there was no direct evidence that he was terminated, there was constructive termination as a result of the failure of the Respondent to pay the Applicant for three consecutive months and for the Respondent's insistence that the Applicant reimburses the Respondent TZS 4,700,000/=. He referred to Section 36 (a)(ii) of the Employment and Labour Relations Act to the effect that the Applicant was constructively terminated "because the employer made continued employment intolerable for the employee". In his view, the arbitrator narrowly defined what constituted a termination in law. He further stated that failure to pay wages constituted a fundamental breach of the contract of employment as per Regulation 6(4)(a) of the Employment and Labour Relations (Code of Good

Practice) G.N No. 42 of 2007. Furthermore, it was Mr. Maganga's submissions that the arbitrator was wrong to believe the Respondent's assertion that the Applicant left work as there was no evidence that the Respondent took any disciplinary measures against the Applicant for abscondment, because none attendance to work constitutes a disciplinary offence.

Responding to the Applicant's submission on the first issue, Mr. Sood raised an issue with the constructive termination aspect sought to be relied by Mr. Maganga. In his view, that the Applicant was terminated due to hardship occasioned by unpaid salaries was a new matter that ought to have been a subject of consideration by the CMA. He made reference to this Court's decision in ***Japhet Philipo Ngole Vs. Juda Paulo Mlingo***, Misc. Land Appeal No. 40 of 2016 (unreported) whereby Levira, (as she then was) held that raising of new grounds on appeal contravenes the right to fair trial. He therefore opted not to respond to it in substance. He also objected to the attachment of a document in the written submissions of the Applicant as by doing so the Applicant was bringing in evidence at the submissions stage. Mr. Sood made reference to the decisions in ***Quality Centre Limited Vs. EADB T/A Trade and Development Bank***, Misc. Commercial Application No. 130 of 2019 (unreported) and ***TUICO Vs. Mbeya Cement Co Ltd & Anor*** [2005] TLR 4.

In further reply to the first ground, Mr. Sood maintained that from the evidence at the CMA, there was no proof that the Applicant was terminated from employment. That from the Respondent's evidence at trial, including exhibits P1, P2, P3, P4 and P5 the Applicant absconded

from work and deliberately avoided the disciplinary hearing. That the Applicant was duty bound to prove that he was terminated as was held by the Court of Appeal in ***Barella Karangirangi Vs. Asteria Nyalwambwa***, Civil Appeal No. 237 of 2017.

In his extensive rejoinder, Mr. Maganga took issues with the submissions made by Mr. Sood. Regarding the use of attachment, Mr. Maganga maintained that he used it to simplify reference as the same document was used at the trial. He further stated that unlike in other civil disputes, labour rules require applications to contain a list and attachment of documents material to the application. He was referring to Rule 24(2)(f) of the labour court Rules GN. 106 of 2007. On whether his submissions contained new matters, Mr. Maganga retorted that it was not a new matter as the issue of unlawful termination was presented before the CMA and was drawn for determination. In his view, the CMA was bound to interpret the concept of termination as is and not narrow it to only one aspect. He further faulted the submissions by Mr. Sood maintaining that the onus to prove whether the employee was fairly terminated does not lie on the employee as per Section 41 of the Employment and Labour Relations Act. Further, that under Section 37 of the Act, the employer should not orally terminate and employee. Mr. Maganga further fortified that the exhibits relied by the respondent were manufactured after he referred the dispute to the CMA and that there was no hearing conducted. Mr. Maganga concluded his response in urging the Court to consider that the Respondent admitted that the Applicant was not paid for three months which fact constitutes a hardship.

Submitting on the second ground of revision, Mr. Maganga stated that there was no proof that the Applicant was summoned for the disciplinary hearing allegedly conducted ex parte by the Respondent. He therefore maintained that the Arbitrator erred in holding that such hearing was fair without proof of summons and without evidence that the Respondent conducted an investigation on the allegations before constituting a disciplinary hearing committee as required by Rule 13(1) of GN. 42 of 2007. He referred to the decision of this Court in ***Tanzania International Container Terminal Services (TICTS) Vs. Fulgence Steven Kalikumtima & 7 Others,*** Revision No. 471 of 2016 (Labour Division, Dar es Salaam, unreported) to cement his views. He was of the view that no efforts were taken to investigate the matter, no summons was ever issued to him and no hearing ever took place. That the documents tending to show that the hearing took place were manufactured after the he instituted the matter at the CMA.

Replying to this ground of revision, Mr. Sood thrashed the issue of investigation raised by Mr. Maganga. He maintained that the issue of investigation was equally a new matter that was not discussed at the CMA. He urged this Court to take no heed on the issue. Regarding whether there was proof of service to the Applicant, the learned counsel stated that two witnesses were summoned on behalf of the Respondent to prove efforts employed to get the Applicants attendance but such efforts failed. He concluded that the ex parte hearing was fair considering that the Applicant never reported back after the Safari and efforts to get his attendance were fruitless.

In a rejoinder, Mr. Maganga retorted that it was absurd for the learned counsel for the Respondent to hold that investigation was a new matter while the same along with service are fundamentals of a fair disciplinary hearing. On the failure to serve the Applicant because he never reported back after the Safari, Mr. Maganga was of the view that there was no such evidence because the evidence of Rajesh Chandarana, the managing director of the Respondent proves otherwise. That the said Rajesh testified that the Applicant went to the office and retired the assignment. Further that there were communications between the Applicant and the Respondent but there was no "SMS" or "WhatsApp message" to notify the Applicant about the disciplinary hearing intention. He maintained that there was no attendance register tendered to substantiate that he never reported back to work after the Safari. Mr. Maganga concluded that the Respondent's assertion that he tried to summon the Applicant in vain are without proof as none of the conventional methods of services, including substituted services, were employed as per Section 97 of the Employment and Labour Relations Act.

Mr. Maganga did not make any substantial submission on the third ground contending that the same was covered in the second ground. This court will treat the ground as having been abandoned. Regarding the fourth ground, it was Mr. Maganga's brief submission that the Arbitrator was wrong to believe that there was an accident reported. He maintained that what was reported to the Respondent was a breakdown and not an accident. Further that the Respondent never stated who reported the accident to them and that the issue of there being an

accident was used by the Respondent to "infringe" the rights of the Applicant.

In response to the fourth ground of revision, Mr. Sood was of the view that whether it was an accident or breakdown, the Applicant committed a misconduct that in turn caused a huge loss to the Respondent. Mr. Sood stated that it was an accident considering that the Applicant failed to even take a photo of the vehicle. That his actions of not reporting the matter to the police tarnish his claims of innocence.

In a brief rejoinder, Mr. Maganga maintained that as there was no accident, the issue of reporting to the police does not arise. He submitted that the pictures of the broken-down spare parts were sent to the Respondent and that they were later surrendered to the Respondent after new ones were fixed.

I have keenly considered the CMA records, the affidavits both in support and against the Application and the rival submissions by the parties' representatives. I do agree with the Respondent that there was no express evidence to prove that the Applicant was terminated. Nevertheless, there are a number of issues that makes this Court to believe that the relationship of the Applicant and the Respondent leaves no room for certainty of facts. First, there is no written agreement from which the terms of employment of the Applicant can be confirmed. Secondly, there appear to have been issues between the Applicant and Mr. Rajesh Chandarana, the managing director of the Respondent. These can be deduced from the messages tendered at the hearing before the CMA. I will first deal with the second ground regarding the alleged disciplinary hearing.

According to the records, the disciplinary processes were initiated by Dora Msangi, the Human Resources and Administration Manager of the Respondent. In her testimony, she stated that she prepared a summons to the Applicant which also contained two counts. She gave it to one Haidery Kikoti who was to call the Applicant and effect the summons. That the said Kikoti reported back that the Applicant responded that he was not going to attend. It is on that basis that the hearing proceeded ex parte. She further stated that during the hearing the managing Director, Rajesh Chandarawa was the complainant. During cross examination she changed the story and said she is the one who called the Applicant. The chairman of the disciplinary hearing was Abdallah Athuman Mjeja. He stated that the Applicant was charged for reporting a fake accident which caused loss to the company amounting to TZS 4,700,000/=. That the disciplinary hearing committee composed of himself, Dora Msangi and one Elihuruma Laizer found the Applicant guilty and recommended that he be given a first warning letter and be directed to reimburse the Respondent. The Applicant was also directed to report back to work. During cross examination this witness appeared to be contradictory of a number of issues including the aspect whether the Applicant was indeed summoned and on who made the findings.

There are a number of disturbing aspects relating to the conduct of the disciplinary hearing. It was the evidence of the managing director of the Respondent that the Applicant reported that there was an accident. He confirmed before the CMA that he sent Justine and one Haidery Kikoti to Songea presumably to confirm whether the reported accident was genuine. Haidery Kikoti is the same person who is said to have been

directed to summon and ensure that the Applicant attended the disciplinary hearing. His evidence on whether the vehicle was indeed involved in the accident and whether the Applicant was summoned and refused to attend the hearing would have been very invariable. He was not called to testify at all. This makes the evidence that the Applicant was summoned for the hearing to be hearsay. In the same vein, the said Kikoti could have been the basis of the investigation which led the disciplinary committee to conclude that the alleged "accident" was fake. I therefore agree with Mr. Maganga that the alleged disciplinary hearing, if at all, was conducted unprocedurally, as the Applicant was not summoned to attend.

Further, the hearing form tendered as exhibit P5 does not disclose why the Applicant did not attend. It is just recorded "hakuwepo". Details of his absence should have been made in the form. Furthermore, what was said to be the evidence of the managing director cum complainant appear contradictory. First,the hearing form states that the accident occurred on 8/4/2017 while the Applicant was driving from **Songea**to Mtwara and that the damage caused a loss of **TZS 4,700,000/=.** Before the CMA, however, his evidence was that the event took place while the Applicant was driving from **Mtwara** to Songea and that the loss was to the tune of **TZS 9,400,000/=.** One also wonders how the Applicant's communications with the Respondent, when he was summoned for the hearing, were not tendered the same way other WhatsApp messages were tendered. Similarly, there is no iota of evidence to substantiate that an investigation had been conducted proving that the Applicant had committed a disciplinary offence worth

constituting a disciplinary hearing committee. I therefore hold that the disciplinary hearing was improper for not complying with the law.

Turning to the first ground, as already stated, there is no proof of express termination of the Applicant. The hearing form read together with the warning letter, exhibit P6, indicate that the Applicant was not dismissed. He was warned. What is not apparent is whether the Applicant was served with the warning letter. From the record, the letter was never communicated to him. In the submissions, Mr. Maganga challenges the finding of the arbitrator on what constitutes termination in law. He is of the view that failure of the Respondent to pay the Applicant for three consecutive months constitutes a "termination". He is right. The termination referred here is the one provided under Section 36 (a)(ii) of the Employment and Labour Relations Act to the effect that the employer made continued employment intolerable for the Applicant. I say so on the following grounds:

One, the Applicant could not sustain himself without a salary. It is not easy for an employee whose salary is TZS 350,000/= to make a serving that will sustain him for three months. Looking at the communication made between him and the managing director (ID1) the Applicant was not likely to be paid for those three months as the managing director said the salary was to be withheld to offset the loss. This fact alone constitutes a hardship and cannot be taken lightly.

Two, from the record, the Applicant was asked to compensate the loss of TZS 4,700,000/= if he was to continue working. There is no proof that the damage to the vehicle was solely attributable to the Applicant. I say so because other than the disciplinary hearing form, there is no

investigation report that links the Applicant to the loss. It could as well be a mechanical defect that the Applicant had no control of and which could not be reported to the police. Had the Applicant agreed to return to work on the condition that he pays that amount he would have required 15 over 15 months salary to offset the loss. No employee can sustain that long without an income.

On that basis, the Applicant's continued employment was rendered impossible by the actions of the Respondent. It is also common knowledge that failure of the employer to pay a salary to an employee constitutes a fundamental breach of the contract of employment as per Regulation 6(4)(a) of the Employment and Labour Relations (Code of Good Practice) G.N No. 42 of 2007. The actions of the Respondent were unreasonable and led to unlawful termination of the Applicant. I thus sustain the first ground of revision.

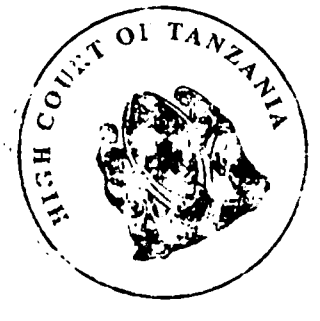
Regarding the fourth ground of revision, I agree with the submissions made on behalf of the Applicant that there was no basis for the learned arbitrator to sustain the assertion that the Applicant reported an accident as opposed to a breakdown. I will not dwell much on this aspect considering what I have decided on the first and second grounds.

Before concluding, I wish to comment on what Mr. Sood challenged regarding introduction of new matters in submissions. I agree with him that submissions cannot be used to introduce new matters. I completely align myself with the authorities cited in that regard. On the other hand, I agree with Mr. Magonga that the WhatsApp attachment that was annexed in his submission was not introducing anything new to this matter. The same was tendered at the trial and it is also part of the

affidavit in support of the Application herein. Relating to the issue of constructive termination and hardship on the part of the Applicant, I do not condone the way he shuns it away as that was the basis of the "oral termination" complained of by the Applicant. Similarly, the issue of investigation which Mr. Sood considered to be a new matter ought to have been considered by the learned arbitrator while discussing the legality of the disciplinary hearing by the Respondent.

For the above reasons, it is the holding of this Court that the termination of the Applicant's employment was both substantively and procedurally unfair. The Respondent is ordered to pay the Applicant compensation for unfair termination amounting to 12 months salary. In addition, the Respondent should pay the Applicant salaries for the months of March, April and May 2017 one month's salary in lieu of notice and certificate of service. For avoidance of doubt, the salary is at TZS 350,000/= as the Applicant did not prove the alleged TZS 400,000/= rate. No order as to costs.

Order accordingly.



Y. B. Masara,
JUDGE.
27th April, 2021.