

**IN THE HIGH COURT OF TANZANIA  
(IN THE DISTRICT REGISTRY)**

**AT MWANZA**

**LABOUR REVISION NO.109 OF 2019**

(Arising from Arbitral Award No.CMA/MZ/LEM/980/2018)

**FORTUNATUS CLAVERY MAGAI ..... APPLICANT**

**VERSUS**

**A & E SECURITY LIMITED ..... RESPONDENT**

**JUDGMENT**

*Last order: 21.02.2020*

*Judgment Date: 26.02.2020*

**A.Z.MGEYEKWA, J**

The applicant's application is was brought under Section 91 (4)(a),(b) and section 94(1) (b)(i) of the Employment and Labour Relations Act No.6/2004 as amended and Rule 24 (1), 28 (1),(c) (d) and (e) of the Labour Court Rules GN.No.106/2007.

The applicant filed a Notice of Application, Notice of Representation, Chamber summons accompanied by an affidavit.

The respondent challenged the application by filing a Counter Affidavit and a Notice of Opposition.

The applicant in his chamber summons prayed for the following orders:-

- a) *That this Honourable Court be pleased to call for records, revise and set aside the whole award of the CMA on dispute No. CMA/MZ/ILEM/980/2018 by Hon. Kachenje, J.J.Y.M Arbitrator issued to the applicant on 12<sup>th</sup> day of November, 2018 on the ground set forth in the attached affidavit in support of this application.*
- b) *That the Honourable Court be pleased to determine the dispute in the manner it considers appropriate.*
- c) *That this Honourable Court be pleased to give any other relief it deems fit and just to grant.*

At the hearing, the applicant appeared in person while Mr. Dutu Chebwa, learned counsel represented the respondent.

The applicant stated that he has filed this revision because he was dissatisfied by the decision of CMA in CMA/MZ/ILEM/980/2018, he complained that the employer promised to pay him all his entitlements but that was not done.

The applicant complained further that the CMA decision was delivered in favour of the respondent. He continued to submit that during trial he tendered a letter of termination and a demand note claiming a pay of 12 months' salary but the CMA did not grant his prayers hence he decided to file this application.

In reply thereto, the learned counsel for the respondent forcefully opposed the applicant's submission that in his affidavit he did not state that the award was delivered in his absence. He added that be it as it is the CMA award is issued to the parties as a hard copy ready for being collected therefore he cannot blame the Arbitrator.

Mr. Chebwa argued that the applicant's actual complaint was concerning unfair termination from the employment but the Arbitrator found that the procedure of termination was followed. He argued that the applicant was summoned to appear before the

disciplinary committee and he was given right to be heard and was required to explain himself why he abstained from work for a month after being transferred to another working station. Mr. Chibwa continued to submit that the applicant admitted that he was not at workplace. He added that PW2 testified that the last time for the applicant to go to work was on 18.11.2017 then he showed up on 11.12.2017, therefore, the Arbitrator was satisfied that absence from work even without holding a Disciplinary Committee amounts to termination. The learned counsel fortified his arguments by referring this court to the case of **Omary Mashel Omary v Ultimate Security (T) Ltd** Revision no. 05 of 2011. He also referred this court to Item 9 of the Employment and Labour Relation (Code of Good Practice) GN.42 of 2007 and the Employer's Guideline also state the same that where an employee is absent for continuous 5 days or more without notice renders to termination.

It was the submission of Mr. Chibwa that the applicant did not dispute or even state any reason for his absenteeism from work for a period of 1 month from 11.11.2017 to 11.12.2017, therefore, the CMA found it was a reasonable ground for termination. Mr. Chibwe

concluded by stating that the termination of the applicant is fair and the procedure was followed by the Arbitrator. He prays this court to dismiss the application for want of prosecution.

In his rejoinder, the applicant reiterated his submission in chief and said that the respondent did not tender the attendance registry and the Disciplinary Committee Report. He added that the respondent is contradicting himself by stating that the last date to be seen was on 11.11.2017 and again they testified he was last seen on 10.11.2017. He insisted that there was no any proof that he was paid. He concluded by stating that the Arbitrator misled himself to decide in favour of the respondent.

I have gone through the record of the CMA and this Court duly considered the submissions of the applicant and the learned counsel for the respondent with eyes of caution. The issue for determination is *whether this revision is meritorious.*

On the issue of whether the respondent followed a fair procedure in terminating the applicant, it is in the CMA records that the employer followed a fair procedure in terminating the applicant.

I am saying so because it is evident that the applicant absconded from work for 5 consecutive days without notice and the applicant did not prove otherwise instead he insisted that the employer did not tender an attendance registry to prove that he was absent from work. There is evidence that the disciplinary committee hearing was convened on 13.11.2018 to discuss the applicant behaviour and the applicant was given a chance to defend himself.

During trial, the respondent tendered a handing over book to prove that the applicant did not sign the hand-over book and he had no good reason for his absenteeism. In my view, it is an offence which constitutes serious misconduct. Item 9 of the /Rule 11 of the Employment and Labour Relations (Code of Good Relation) GN.42 of 2007 states clear that:-

*" Absence from work without permission or without acceptable reason for more than 5 days is considered an offence constituting serious misconduct justifying termination. "*

Similarly, in the case of **Omary Mashel Omary v Ultimate Security (T) Ltd** (supra) the court observed that absence from work

without notice for 5 consecutive days without notice amounts to termination. The applicant was required to follow the rules and guidelines which were set by the law and his Employer. Additionally, it should be known that the seriousness of the misconduct has to be ruled in relation to the nature of the job in the instant case the applicant as a security guard was required to guard the respondent working place for the duration agreed with his employer, therefore, the applicant absence without notice was likely not only to disrupt the normal business of the respondent but also could seriously endanger security of client and their properties. The applicant on his own will decided to abstain from work for one month and he did not state any good reason for his absenteeism instead he is complaining that he was unfairly terminated forgetting that his act had a serious consequence and the same attract severe punishment. and in the case of **Amina Ramadhani v Staywell Apartment Ltd** Labour Revision No. 461 of 2016, it was held that:-

*" It is the finding of this court that the applicant did not establish her reasons for absent from work from 29.08.2012 to 19.09.2012. Therefore absenteeism stands here as a valid reason to terminate*

*the applicant as the applicant was failed to provide sufficient evidence."*

The applicant's claim that the respondent did not tender the Attendance Registry should not waste time of the court since the respondent proved that the applicant was absent from his workplace for a month. The respondent's argument was supported by DW2 evidence on page 21 of the CMA proceeding that the applicant was absent from work from 09.11.2017 to 11.12.2017 and that is the last date when the applicant signed the attendance registry. Moreover, the Employer proved that the applicant was absent from work, he tendered a handing over book (Exh. AE – 6). The handing over book reveals that the applicant's last date to sign the handing-over book was on 07.11.2017 and the applicant showed up in the office on 11.12.2017. On page 19 of the CMA, proceedings show that the applicant confessed that he was absent for 5 days and that he was aware of his charges before entering into the disciplinary hearing meeting. Therefore from what I gathered on the records, it is the applicant who substantiated his absence thus the Arbitrator was correct to terminate him.

In determining the remedies as prayed by the applicant, I had to go through the CMA F1, and I found that the applicant prayed for the following remedies compensation after being terminated, annual leave pay and salary for November. I agree with the findings of the CMA Arbitrator that misconducted proved a fair termination of contract therefore the applicant is not entitled to compensation and he failed to prove which annual leave he was claimed against the respondent.

In relation to the salary of November 2017, it is on record that the respondent notified the applicant through the termination letter that he will pay the applicant among other things; a 10 days November salary for days which he served the respondent. In the record, the respondent testified to have paid the applicant Tshs. 100,000/= and Tshs. 25,000/= but the same were not supported by any evidence taking to account that the applicant during trial complained that he was not paid and the respondent did not cross-examine him , failure to cross-examine the applicant renders to admission of it. Therefore; I rule out that the applicant was not paid.

For the above-stated reasons, I partly I revise the decision of the Arbitrator to the extent that the Arbitrator position that the termination of the applicant employment was both substantively and procedurally fair is upheld. But I order the respondent to pay the applicant a total sum of Tshs. 125,000/= as part salary for November 2017.

Order accordingly.

Dated at Mwanza this date 26<sup>th</sup> day of February 2020.



  
A.Z.MGEYEKWA  
**JUDGE**  
26.02.2020

Ruling delivered on 26<sup>th</sup> day of February 2020 in the presence of the learned counsel for the applicant and the respondents.

  
A.Z.MGEYEKWA  
**JUDGE**  
26.02.2020