

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
[IN THE DISTRICT REGISTRY]
AT ARUSHA

REVISION APPLICATION NO. 44 OF 2018

(Originating from Labour Dispute No. CMA/ARS/ARB/191/2016)

NET HEALTH LIMITED APPLICANT

Versus

CHRISTOPHER JOSEPH MAKASI RESPONDENT

JUDGMENT

11th February & 20th May, 2021

MZUNA, J.

In the Commission for Mediation and Arbitration of Arusha (the CMA), **Christopher Joseph Makasi** (the respondent herein) filed his labour dispute vide CMA/ARS/ARB/191/2016 against his employer **Net Health Limited** (the applicant herein) claiming that he was unfairly terminated from employment. Having heard the parties and exhibits tendered, the CMA in its award delivered on 23/4/2018 was satisfied that the respondent's termination was both substantively and procedurally unfair. In the end result, the applicant was ordered to pay the respondent 24 months remuneration as compensation for unfair termination to the tune of Tshs 4,920,000/=, three months' salary in lieu of notice Tshs 615,000/= and severance pay to the tune of Tshs 134,615/=. The applicant was ordered to effect the payments within a period of 21 days from the date of the award.

Before delving into what was argued by the parties in respect of the application, it is resourceful to demonstrate the facts of the case leading to this application, albeit briefly. The respondent was employed by the applicant in the position of Machine Operator on 22/7/2011. In the course of his employment, on 29/6/2016, he was assigned to perform a certain task by his supervisor but he defied the order, on the contrary he used abusive words to his supervisor. Due to the fact that the respondent had several warning letters, on the same day he was issued with summons to appear before the Disciplinary Committee hearing on 1/7/2016. The hearing was adjourned until 4/7/2016 when his claim was determined, although the respondent denied that the hearing was not conducted. According to the minutes of that meeting (exhibit D6), the respondent admitted to have committed the alleged misconducts, therefore the committee considering the previous warnings against the respondent suggested his termination from employment. On the same date, the respondent was issued with termination letter (exhibit C2). On 22/7/2016, the respondent filed his complaint in the CMA, subject of this revision.

The application is supported by affidavit deposed by Kelvin Edward Kagilwa, the advocate for the Applicant while the respondent opposed the application in a counter affidavit deposed by Mengo Sichilongo, the respondent's representative from TUICO. At the hearing of the application, the parties herein were represented by the respective deponents of the affidavits. Hearing of the application proceeded by way of written submissions.

There are three issues for determination:- First, whether there was fair reason in the respondent' termination? Second whether there was fair procedure. Lastly, what remedies are available?

Let me start with the first issue on whether there was fair reason in the termination?

Submitting in support of the application Mr. Kagilwa argued that the applicant's evidence was not considered, which led to an unjustifiable conclusion that there was no fair reason in the respondent's termination in the purview of rule 12(3) of the Employment and Labour Relations (Code of Good Practice) (herein referred as G.N 42 of 2007). He fortified that the conduct of the respondent and being the employee of the applicant amounted to serious misconduct which deserve the applicant with no other option than terminating his contract. He referred this as gross insubordination, referring the case of **Sharifa Ahmed Vs. Tanzania Road Haulage (1980) Ltd**, Revision No. 299 of 2014 (Labour Div. DSM). Mr. Kagilwa referred to the warning letters issued to the respondent stating that the applicant had every reason of terminating his employment as per rule 12(4)(b) of G.N 42 of 2007, which requires the employers before terminating employees to take into consideration factors including the employee's employment record. He concluded that the respondent was terminated on fair reason as he was aware that he was duty bound to obey the instructions of his superior.

On the second issue of fair procedure, Mr. Kagilwa, maintained that the respondent was given a fair hearing in the disciplinary committee on 4/7/2016, he attended and signed the minutes. He faulted the arbitrator's holding that the disciplinary committee

failed to use the prescribed form to notify the respondent of the disciplinary hearing stating that such failure alone cannot be the ground to conclude that the respondent was not afforded the right to be heard. He maintained that the offence was communicated to the respondent in the language that he fairly understood, he attended the hearing and defended his side to the extent that he admitted the charges against him. To support his argument, Mr. Kagilwa cited the case of **Nickson Alex Vs. Plan International**, Revision No. 22 of 2014 (Labour Div. at Mwanza). The other complaint regards to the arbitrator's award of Tshs 205,000/= as annual leave without any supporting evidence and contrary to what was pleaded by the respondent in Form No. 1. He maintained that in form No. 1 the respondent pleaded that he was entitled to annual leave remuneration to the tune of ~~Tshs 100,000/=~~ contrary to what was awarded to him by the arbitrator. It was the learned advocate's view that awarding of annual leave has to be in conformity with what is pleaded in form No. 1, citing the case of **Marine Services Company Ltd Vs. Wilbard R. Kilenzi**, Revision No. 5 of 2014 to buttress his argument.

Responding on the third issue of awarded reliefs, Mr. Kagilwa, says the arbitrator erred in awarding Tshs 134,615/= to the respondent as severance pay while the employment was terminated citing rule 26(2)(b) of G.N No. 42 of 2007. Mr. Kagilwa reiterated that the conduct of the respondent falls within the ambits of misconduct which entitled the applicant to terminate his employment without payment of severance pay. He implored this Court to set aside the proceedings and the CMA award.

Let me say right from the outset that the respondent did not file reply submission. What he assumes to be the reply submission is only counter affidavit contrary to what

was argued by the applicant's advocate. Despite that fact, yet it does not mean that the applicant is entitled victory. The court has the duty to see if he has proved what he alleges to be the applicant's right. In other words, is the decision of the CMA justifiable in law? Put it differently, was the respondent's employment fairly terminated by the applicant based on fair reason and procedure?

The first issue hinges on the validity of the reason for terminating the respondent's employment. Mr. Kagilwa faults the arbitrator's failure to consider the evidence of the applicant on the issue of misconduct.

According to the applicant's witnesses, the respondent was assigned a task to perform by his superior (DW1), but he refused and on the contrary he spoke abusive words to DW1 "kutumia lugha ya udhalilishaji kwa meneja Uzalishaji." The respondent admitted to the misconduct. The respondent was busy making stories while the machine was in operation, but when he was asked why he was making stories during working time, he asked him "*Wewe unanieleza kama nani? Sikutambui*". There is proof that the alleged insubordination was committed by the respondent.

He was therefore fairly terminated as per Rule 12 of G.N 42 of 2007 and section 37 of Cap 366 of 2007 [R.E 2019]. The learned counsel is right to say, the respondent admitted the alleged misconduct. There is fairness of the reason for terminating the respondent's employment based on misconduct.

The finding of the arbitrator cannot be allowed to stand. Having admitted the charge, even with the absence of investigation under rule 13(1) of G.N 42 of 2007, still

the termination was fair. The respondent's termination was fair both substantively and procedurally.

In conclusion, the respondent should be awarded 12 months salaries only without severance pay based on misconduct as well submitted by Mr. Kwagilwa, the learned counsel. He should also be given a clean certificate of service.

Revision application is allowed with no order as to costs. Order accordingly.

