IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

LABOUR REVISION NO. 35 OF 2021

(Originating from Labour Dispute No. CMA/ARS/ARB/206/2020)

ZAKARIA MKUMBO.....APPLICANT

VERSUS

HOLLY PEAK ACADEMY.....RESPONDENT

JUDGMENT

25/04/2022 & 09/05/2022

GWAE, J

This is an application for revision which has been brought by the applicant **Zakaria Mkumbo** against his former employer **Holly Peak Academy.** The applicant is seeking for revision of the award of the Commission for Mediation and Arbitration (CMA) which was delivered on the 1st April 2020 in favour of the respondent.

The CMA decision was to the effect that, the applicant was terminated on valid reasons of negligent driving of the respondent's school bus which caused an accident while driving the students back home. However, on the

aspect of procedural adherence, it was found out that the respondent did not conduct disciplinary hearing before terminating the applicant's employment. Nevertheless, guided by the decision of this court before Mipawa, J the arbitrator refrained from granting remedies as permitted by section 40 of the Employment and Labour Relation Act Cap 366 Revised Edition, 2019 on reasons that one cannot benefit from his own wrong and the holding that the misconduct was so grave which threatened the lives of pupils.

The application is supported by the affidavit of the applicant and it is in the affidavit where the applicant has faulted the award of the CMA by stating that;

1. That, the arbitrator erred in law and in fact for holding that the applicant was fairly terminated.
2. That, the arbitration erred in law and in fact for holding that the applicant was a negligent driver.
3. That, the arbitrator erred in law and in fact for holding that the applicant was never given right to be heard but still blesses the termination.

4. That, the arbitrator erred in law and in fact by failure to properly assess and evaluate the evidence tendered before it, leading to wrong findings.
5. That, the arbitrator award has occasioned miscarriage of justice to the applicant.

The respondent, on the other hand, strongly opposed the application through the counter affidavit sworn by the respondent's Principal Officer one Pudenciana Kisaka stating that the CMA award was properly procured.

At the hearing of this application the applicant was represented by Mr. Faustine Stephen, the applicant's personal Representative while the respondent enjoyed legal services from Mr. Joseph Ngiloi, the learned counsel. With leave of this Court, hearing of the application was by way of written submissions.

Submitting on the validity of the reason, the applicant submitted that, the alleged negligence driving was not proved by the respondent and above all there was no any police report or decision from the court to prove such allegations. The applicant went further to state that there was no any accident that occurred except that the car got stacked due to over loading

of the students in the school bus. He also faulted the evidence of the respondent's witnesses in particular RW2 and RW3 stating that their evidence was so contradictory as far as the incidences especially on how the two accidents occurred.

As to the procedural aspect, the applicant cited rule 13 of GN No. 42 of 2007 which demonstrate procedures to be followed by the employer in terminating the employee's employment. According to the applicant he was not accorded with the right to be heard before his termination and that the warning that he was given does not justify termination without being given his right to be heard. In his conclusion, the applicant submitted that since termination was unfair, he was supposed to be awarded compensation accordingly.

Responding to the applicant's submission, the respondent supported the CMA award and stated that the applicant herein while testifying at the CMA admitted to have caused an accident except that he said the accidents were caused by overloading of the students. The respondent on stating that at the CMA they produced evidence to substantiate the accidents through warning letters issued to the applicant and the same were admitted and marked as exhibit P1 collectively. The respondent also cited rule 12 of the

Rules, 2007 by stating that termination of the applicant's employment was in conformity with the Code. The respondent added that the misconduct of the applicant was so grave as it threatened the safety of the children and therefore for any reason the applicant could not continue driving the respondent's school bus.

The respondent also submitted that the CMA had the discretion to award no remedy to the applicant as the accident also led to the damage of the school bus and loss of money.

Having considered the parties' written submissions together with the records, this court is of the view that the issue to be determined by this court is whether the Commission was justified to have dismissed the applicant's complaint.

On the aspect of validity of the reasons for termination, it was the finding of the CMA that the applicant herein was terminated on valid reasons after being satisfied that the applicant had caused two accidents while driving the respondent's school bus with the pupils in it. The CMA also considered the warning letters which were tendered and admitted as exhibit P1 collectively as a justification of the applicant's misconduct. Therefore, the

CMA was of the finding that, the applicant's through his negligence driving had caused two accidents and therefore the respondent herein had valid reasons to terminate the applicant.

The applicant is now challenging the CMA finding and maintains that he did not cause any accident.

From the records of the Commission, it appears that, the proof of the applicant's misconduct is founded on the warning letters that were admitted and marked as exhibit P1 collectively together with the evidence of the respondent's witness. RW2 and RW3 were the eye witnesses and teachers of the respondent, they testified to have witnessed the accidents caused by the applicant due to his reckless driving. According to RW2 she testified that on 29/06/2020 the applicant was recklessly driving the school bus which led to its falling into a trench. RW3 also testified that on 02/07/2020 the applicant again recklessly drove the respondent's school bus and it fell into a trench. These testimonies were backed by the warning letters (exhibit P1).

This court has also gone through the warning letters which were issued to the applicant after he was alleged to have occasioned the accidents. The first warning letter was dated 30/06/2020. In this warning letter it was

alleged that the applicant negligently drove the school bus to the trench. The letter also revealed that the applicant when asked to give explanations as to the cause of the accident, he denied and stated that the car did not enter into a trench but it only stopped.

The second warning letter dated 02nd day of July 2020, in this letter the applicant was warned for damaging the sample of the car causing leakage of oil and consequently the applicant was required to pay for costs of maintenance.

Much as it is evident through the warning letter dated 30th Juned 2020 followed by the one date 2nd day of July 2020 that, the applicant might have committed the misconducts by causing an accident and the same might have endangered the lives of the pupils yet the said misconduct was patently denied by the applicant as depicted in the said warning letters. Hence, I am compelled to decline joining hands with the findings of the CMA that the respondent had valid reasons to terminate the applicant. I am however alive that by any means a driver who does not perform his duties diligently is by any means not expected to continue driving the pupils or else it will be to put their lives in danger however there must be proof of the alleged careless

or negligent driving or admission on the part of the driver/applicant which is not the case here.

As to the second aspect of the procedures to be followed in terminating the applicant. First and foremost, it should be noted that in this matter the applicant herein was not issued with the termination letter save for a notice of termination dated 27th July 2020. However, it appears that the applicant was duly paid his terminal benefits which is one-month notice and severance payment.

Secondly, as rightly observed by the CMA, the respondent did not conduct a disciplinary hearing. At this juncture that the applicant is found seriously faulting the reasoning of the Hon. Arbitrator for not awarding him remedies even after he found out that the respondent glaringly defaulted in conducting the disciplinary hearing. The learned Arbitrator in reaching to his decision was guided by the decision in the case of **G4 Security Services (T) Ltd vs Peter Mwakipesile** Labour Revision No. 109 of 2011 where it was stated that;

> "I agree, termination was procedurally unfair, but in circumstances of this case, where termination is substantially fair (as I have found) and the issue subject

of a misconduct charge is straight forward and undenied, proper exercise of desertion justify granting no remedy as permitted under section 40 of the ELRA."

With due respect to the learned arbitrator, I wish to state that the above holding is distinguishable from the circumstances of the case at hand as in the former case, the misconduct was undenied in the matter at hand the applicant patently denied to have caused the accident as he contended that, the destruction of the motor vehicle sample was caused by the overloading of the pupils. Therefore, it is the view of the court that, the position of the law in the case of **G4 Security Services (T) Ltd** (supra) is distinguishable from the circumstances of the case at hand as the applicant did clearly deny the alleged misconducts. It is the statutory requirement under rule 13 of the Code of Good Practice that a disciplinary hearing be held before terminating the employee's employment the omission is so fundamental as it denied the applicant his right to be heard this position was stated in the case of **M/S Komesha Security Services Ltd v. Said Ching'umba,** Labour Revision No. 12 of 2014 Reported in the Labour Court Cases Digest 2015 where this court was faced with similar situation and held that;

"In our instant case it is evidenced from the records that there was no disciplinary hearing conducted by applicant before terminating respondent such omission is a fundamental irregularity because it denied respondent his right to be heard."

Therefore, it is with no doubt that the applicant was unfairly terminated in terms of procedural aspect, the right to be heard, the right which goes to the root of the case. Had the applicant clearly admitted the disciplinary offences, the findings of the Commission would have been sustained.

Consequently, the respondent is hereby ordered to pay the applicant a compensation of 12 months compensation (250,000/= x12)= 3,000,000/= together with the letter of termination.

It is so ordered.

Dated at Arusha this 9th May 2022

M. R. GWAE
JUDGE
09/05/2022

Court: Judgment delivered in the presence and absence of the applicant and respondent respectively

M. R. GWAE
JUDGE
09/05/2022