

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
LABOUR DIVISION
AT DAR ES SALAAM

REVISION NO. 186 OF 2020

BETWEEN

ARNOLD ANATORY NDYETABURA.....APPLICANT

AND

CHINA RAILWAY SEVENTH GROUP COMPANY LTD.....RESPONDENT

JUDGMENT

Date of Last Order: 14/04/2021

Date of Judgment: 11/06/2021

A. E. MWIPOPO, J.

This revision application is filed against the award of the Commission for Mediation and Arbitration (CMA) in Labour Dispute No. CMA/DSM/KIN/785/19 which was delivered on 30th April, 2020. Arnold Anatory Ndyetabura, the Applicant herein, is applying to this Court for an order in the following terms: -

1. That, this Court be pleased to call for the records of the Commission for Mediation and Arbitration in the proceedings of the original Labour Dispute No. CMA/DSM/KIN/785/2019 between above mentioned parties which its award was delivered by Hon. Massay, Arbitrator on 30th April, 2020 and revise the proceedings and the award thereof and substitute with the order to compensate the Applicant by payment of 24 months' salaries amounting to

Tshs. 52,000,000/= for failure to observe the fair labour practice procedure.

2. That this Honorable Court be pleased to grant such other reliefs or orders in favour of the Applicant as it may deem fit and just to grant.

The application is supported by Applicant's affidavit which in paragraph fourteen contains four legal issues that arise from material facts.

The respective legal issues are as follows;

- (i) Whether the Hon. Arbitrator was correct not to determine the issue framed for adjudication and instead determine on issue which were not framed at all and not in dispute without affording the parties the right to be heard.
- (ii) Whether the Hon. Arbitrator was correct to hold as he did that the Applicant's termination of his employment contract was with justifiable reasons without determining whether the fair labour practice procedure were followed or not.
- (iii) Whether the Hon. Arbitrator was correct to hold that the dispute between the Applicant and the Respondent was about breach of contract and not about failure to adhere to the fair labour practices procedure in terminating the Applicant's employment.

- (iv) Whether the Hon. Arbitrator was correct to grant relief not prayed for and not to grant the one prayed for in CMA Form No. 1.

The historical background of this dispute in brief is that; the Applicant was employed by the Respondent namely China Railway Seventh Group Company Limited in a position of legal advisor on 27th May, 2019. He was terminated from the employment by the Respondent on 29th August, 2019. The Respondent was not satisfied with the termination and he referred the dispute to the Commission for Mediation and Arbitration which decided that the termination was fair. The Applicant was aggrieved with the Commission decision he decided to file the present revision application.

At the hearing of the application, the Applicant was represented by Mr. Joseph Kiyumbi Sungwa, Advocate, whereas the Respondent was represented by Mr. Albert Mkuhi, Advocate.

Submitting in support of the application, the Applicant's Counsel commenced to submit on the second issue whether the Hon. Arbitrator was correct to hold as he did that the Applicant's termination of his employment contract was with justifiable reasons without determining whether the fair labour practice procedure were followed. He averred that the Arbitrator framed two issues during hearing of the dispute before the Commission. The first one is whether the employer followed fair labour practice

procedure in terminating the Applicant and the Second legal issue is whether the Applicant is entitled to the relief prayed.

The Counsel was of the opinion that the Arbitrator did not direct himself to the issues framed and the evidence adduced. Mandatory procedures under rule 10 of the Employment and Labour Relations (Code of Good Practice) Rules, G.N. No. 42 of 2007 were not complied. There is no evidence in record to show that the Respondent complied with the provisions of rule 10 of G.N. No. 42 of 2007 and the Applicant was never given an opportunity to improve or to prove that his performance was evaluated. It is mandatory for the employer to follow the procedure provided by the law otherwise the termination will be unfair labour practices as it was held in the case of **Sam Frost E.A. Ltd vs. Laurean Waijah, Revision No. 1 of 2020, High Court Labour Division, at Dar Es Salaam, (Unreported)**. Thus, the Commission award has to be set aside for failure to follow fair labour practices.

The Applicant's counsel argued ground No. 1 and 3 jointly that the failure of Arbitrator to confine himself to the issue framed was improper, illegal and irregular. He cited the case of **Gabriel Joseph vs. Ambros Mukoli and Others, P.C. Probate Appeal No. 5 of 2020, High Court of Tanzania, Musoma District Registry, at Musoma, (unreported)**, where the Court cited with approval the decision of the Court of Appeal in the case of **Ex. B. 8356 S/Sgt Sylvester S. Nyange vs. The Inspector**

General of Police and Another, Civil Appeal No. 64 of 2014, (Unreported). The Arbitrator suo motto raised the issue of breach of permanent contract without giving parties right to be heard on the issue. In the case of **Kumbwandumi Ndemfoo vs. Mtei Bus Service Ltd, Civil Appeal No. 257 of 2018, Court of Appeal of Tanzania, at Arusha, (Unreported),** the Court of Appeal of Tanzania held that the right of the party to be heard before adverse action is basic that a decision which is arrived in violation of it will be nullified even if the same decision would have been reached had the party been heard because the violation is considered to be breach of natural justice.

The Counsel submitted on the 4th issue that the Arbitrator erred to grant notice pay only which was not claimed by the Applicant and denied him payment for compensation for 24 months' salary for unfair termination as claimed in CMA Form No. 1. The Court granted similar relief in the case of **Agnes B. Buhere vs. UTT Microfinance PLC, Revision No. 459 of 2015, High Court Labour Division at Dra Es Salaam, (Unreported).** The Applicant prayed application be allowed and to be compensated for unfair termination.

In reply to Applicant's submission, the Respondent counsel submitted that the Arbitrator directed himself to the issue framed and the evidence Adduced. Testimony of DW1 and DW3 and Exhibit R1, R2 and R3 proved that the Applicant was terminated for misconduct and poor performance

while under probation. The Applicant was notified on June, 2019, and was called to a meeting on August, 2019 to discuss his poor performance but he left the meeting after he became furious. The Applicant's performance was examined as proved by testimony of DW1. As a lawyer, the Applicant was supposed to behave like a professional. The Respondent adhered to all procedure for termination under rule 10 of the G.N. No. 42 of 2007.

Regarding to the allegation that the Arbitrator suo motto raised issue for determination, the Respondent's counsel submitted that the Arbitrator did not determine unframed issues as a result the cited case of **Kumbwandumu Ndemfoo Ndos** is not applicable in this application. The CMA Form Na. 1 contains prayers for payment of compensation for 24 months for breach of contract. This raise the issue of breach of contract since parties are bound by pleadings as it was held in the case of **Barclay Bank limited vs. Jacob Muro**, Civil Appeal No. 357 of 2019, Court of Appeal of Tanzania, at Mbeya, (Unreported).

The Respondent Counsel submitted regarding to the relief awarded by the Arbitrator that Applicant's commission for payment of 24 months' salary compensation has no basis. The Respondent complied with the rules in terminating the Applicant. Thus, the case of **Agnes Ruhele** (supra) cited by the Applicant is not applicable or fundamental factual differences. In the cited case the employer did not submit evidence at all but in this case the employer has proved that the termination was fair. The notice pay does not

exclude probationary employee upon termination. The Arbitrator has discretion to award relief not claimed if provided by the law as it was held in **Salkaiya Seif Khamis vs. TMD Travel Services (Satguru), Revision No. 658 of 2018, High Court Labour Division, at Dar Es Salaam, (Unreported)**. The position is supported by the decision in the case of **Anthony Ngoo and Another vs. Kitinda Kimaro, Civil Appeal No. 25 of 2014, Court of Appeal Of Tanzania, at Arusha, (Unreported)**. He prayed for the application to be dismissed for want of merits.

In rejoinder, the Applicant's Counsel retaliated his submission in chief and emphasized that there is no evidence adduced before the Commission to prove that the Applicant was called in a meeting or any communication regarding the alleged poor performance. This dispute is the failure of the Respondent to adhere to fair labour practice.

From the submissions, the issues for determination are as follows; -

- i) Whether the Commission arbitral award was properly procured.
- ii) Whether fair labour practice procedures were followed in the termination of the employee under probation.
- iii) What are the reliefs entitled to parties?

In determination of the first issue whether the Commission award was properly procured, I find it pertinent to look at the law which provides for framing of issues before the Commission for Mediation and Arbitration. Framing of the issues is one of the stages of arbitration process according

to rule 22 (2) of the Labour Institutions (Mediation and Arbitration Guidelines) Rules, G.N. No. 67 of 2007. Under the rule, there are five stages of the arbitration process. Opening statement and narrowing of issues is the second stage of arbitration process. Narrowing of issues in dispute is done at the conclusion of the opening statement according to rule 24(4) of the G.N. No. 67 of 2007. Its purpose is to eliminate the need of evidence in respect of factual dispute. This means that framing of issues helps parties to the dispute to adduce evidence on facts which were disputed. Failure to frame issues from the opening statement is against rule 24(4) of G.N. No. 67 of 2007. Also, failure to frame crucial issue(s) may lead to the wrong award. In **Safi Medics vs. Rose Peter, Mganga Mussa and Richard Karata, Revision No 82 of 2010, High Court of Tanzania Labour Division, at Tanga, (Unreported)**, the Court held that:-

"A successful arbitration requires that both the arbitrator and the parties in the dispute have a common understanding of the issues in controversy".

According to rule 24(4) of the G.N. No. 67 of 2007 it is the arbitrator who shall narrow down the issues in dispute. Parties to the dispute may assist in the framing of issues to the dispute, but it is the duty of the Arbitrator to frame issues in the dispute before the Commission.

In this application, the Applicant submitted that the Arbitrator *suo motto* raised the issue of breach of permanent contract without giving parties right to be heard on the issue which is the breach of natural justice.

In opposition, the Respondent's counsel submitted that the Arbitrator directed himself to the issue framed and the evidence Adduced.

It is in record that the Commission framed two issues for determination. The first issue whether the Respondent followed fair labour practice procedure in terminating the Applicant's employment and the second issue is whether the complainant (Applicant) is entitled to the relief claimed. I have read the Commission award and I'm satisfied that the Arbitrator directed himself to the issues framed and the evidence adduced. After analysis of issues and the evidence adduced he reached his verdict. Nowhere in the Commission award were the Arbitrator framed any issued concerning the breach of contract. Thus, the Applicant allegation has no basis.

The second issue is whether fair labour practice procedures were followed in the termination of the employee under probation. The evidence from both parties shows that the Applicant was terminated from employment on 29th August, 2019 while still on probation period. Rule 10(8) of Employment and Labour Relations (Code of Good Practice) Rules, G.N. No. 42 of 2007, provides how to terminate employees who is under probation. The rule provides as follows, I quote:-

"10-(8) Subject to sub-rule (1) the employment of a probationary employee shall be terminated if-

(a) the employee has been informed of the employer's concerns;

(b) the employee has been given an opportunity to respond to those concerns;

(c) the employee has been given a reasonable time to improve performance or correct behaviour and has failed to do so."

From the rule, the procedure for terminating employee under probation for more than 6 months includes that the employee has to be informed about employers concern, employee to be given opportunity to responding to the employee concern and to be given enough time to rectify the behavior. The testimony of DW1, DW2 and DW3 proves that the Applicant was informed about his poor performance and behavior. The attendance sheet - exhibit R1 and R2 proves that the Applicant was not signing attendance sheet. On the other allegations of reporting to work while drunk and watching youtube during working hours, I'm of the opinion that the same needed more proof since the Applicant opposed the allegation.

The Arbitrator held that the Respondent notified the Applicant and called him on the meeting to discuss the poor performance. However, the evidence in record says something else. DW1 and DW2 testified that the meeting was held. But the witnesses do not provides the details of the meeting as to when and where it was held. Also, there is no information to the persons who attended the meeting and if the Applicant was afforded his rights to bring fellow employee or representative of his choice or he was notified of the meeting. Moreover, there is no minutes of the respective

meeting which was tendered as exhibit to prove that the meeting was held. This court in the case of **Happiness Geff vs. Wadhamini KKKT (Dayosisi ya Mashariki Ziwa Victoria)**, Revision No. 35 of 2013, High Court of Tanzania, Labour Division, at Mwanza, held that, I quote;

“the Employment and Labour Relations Act embodies principles of fair labour practices in respect of all employees irrespective of their categories; although such principle do not extend to coverage under unfair termination for all categories”.

Failure of the Respondent herein to comply with rule 10 (8) of the G.N. No. 42 of 2007 which provides for the procedures to be followed amount to unfair labour practices.

The last issue is what are the reliefs entitled to parties? As I did find in second issue that the Respondent's termination of Applicant's employment amount to unfair labour practices, the Respondent is supposed to pay compensation for unfair labour practices. In deciding the amount to be paid as compensation, I have considered the circumstances of the case especially the testimony of DW1, DW2 and DW3 that the Applicant performance was poor, he was not signing attendance sheet and sometimes was absent from work without permission. Also, I have considered the time he worked for the Respondent. Thus, I order the Respondent to pay the Applicant three months' salary compensation for unfair labour practice. In

this application, the available evidence shows that the Applicant's monthly salary was shillings 2,200,000/=.

Regarding the payment for notice pay, the evidence available in record shows that on 9th September, 2019 is the date when the Applicant was informed that his employment will be terminated on 27th September, 2019. This means that he was given notice of 18 days. For the employee under probation, rule 10(8) of the G.N. No. 42 of 2007 does not provide for 30 days' notice among the procedures to be followed during termination of employment of probationary employee. I'm of the opinion that the Arbitrator erred to award notice pay to the Applicant. For that reason thus, I set aside the award of shillings 2,200,000/= being the notice pay which was awarded by the Commission.

Therefore, I order the Respondent to pay the Applicant a sum of shillings 6,600,000/= being three months' salary compensation for unfair labour practice. The revision application is allowed and the Commission award is set aside. Each party to take care of his own cost of the suit. It is so ordered.



A. E. MWIPOPO
JUDGE
11/06/2021