

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

(CORAM: NDIKA, J.A., KITUSI, J.A. And RUMANYIKA, J.A.)

CIVIL APPEAL NO. 232 OF 2019

FREDY NGODOKI APPELLANT

VERSUS

SWISSPORT TANZANIA PLCRESPONDENT

**(Appeal from the decision and order of the High Court of Tanzania,
(Labour Division) at Dar Es Salaam)
(Wambura, J.)**

dated 25th day of July, 2019

in

Revision Case No. 726 of 2019

JUDGMENT OF THE COURT

14th February & 8th day of March,, 2022

RUMANYIKA, J.A.:

Fredy Ngodoki, the appellant, was employed by Swissport Tanzania PLC, the respondent, as an aircraft loader on a two years fixed-term contract. Having been prematurely terminated on 04/11/2015, he instituted an unfair termination claim in the Commission for Mediation and Arbitration for Dar es Salaam at Dar es Salaam (the CMA). At the end of it all, the CMA upheld the claim and awarded him TZS. 6,272,000.00 being sixteen months remuneration as compensation. However, it turned out that the appellant was unsatisfied by the CMA's

award. Accordingly, he filed a revision in the High Court, Labor Division demanding remuneration for sixteen months as additional compensation on top of what was awarded by the CMA. The High Court, (Wambura, J.) was unimpressed. It overturned the award as it was satisfied that the appellant's termination was substantively and procedurally fair. For ease of reference, we extract part of the decision;

"... I have herein found that there was a valid reason in terminating the applicant and that the procedures were properly adhered to. So there was a justification for the termination...."

The appellant is unhappy with the above outcome, hence the instant appeal. In his memorandum of appeal, the appellant faults the judge on three points; (i) that actually the termination was unfair (ii) that the judge made the decision only based on hearsay evidence and (iii) that the judge wrongly denied him compensation.

When the appeal came up on 14/02/2022 for hearing, Mr. Emmanuel Mashamba, learned counsel, appeared for the appellant while the respondent had the services of Ms. Abbriaty Kivea, also learned counsel.

Submitting in support of the appeal, Mr. Mashamba essentially argued that in terms of sections 37 and 39 of the Employment and Labor Relations Act, Cap. 366 R.E. 2019 read together with Rule 9(1) of Employment and Labour Relations (Code of Good Practice) Rules, 2007 GN No. 42 of 2007 ("the Code") the respondent as employer had the onus before the CMA to establish that the appellant was terminated from his employment for a valid and fair reason and upon fair procedure. He contended that instead of discharging that burden, the respondent did not lead any evidence in that regard. He added that the High Court did not pay due regard to the respondent's total failure to adduce evidence instead it took into account certain extraneous matters in favour of the respondent to arrive at its erroneous finding as aforesaid. He cited this court's decisions in the case of **Dew Drop Co.Ltd v. Ibrahim Simwanza**, Civil Appeal No.244 of 2020. Given the court's discretion, he cited the case of **Republic v. Donatus Dominic @ Ishengoma and Six Others**, Criminal Appeal No. 262 of 2018 (both unreported)

In reply, Ms. Kivea disagreed with her learned friend. Essentially she submitted that the impugned termination was for a valid reason and that due process was followed and therefore the appellant was

entitled to no compensation or anything as correctly held by the High Court. She added that the cases of **Dew Drop Co. Limited** (supra) and **Republic v. Donatus Dominic @ Ishengoma and 6 Others** (supra) cited by the appellant's counsel were distinguishable on the ground that in the instant case the appellant confessed to the gross misconduct.

As it stood both in the CMA and the High Court, the issue for our consideration is whether the appellant's termination was substantively and procedurally fair whose answer we think will resolve the appellant's three grounds of appeal and therefore sufficiently dispose of the appeal.

In resolving the above posed issue we find it both logical to extract the provisions of s.39 of the ELRA casting the burden of proof in unfair termination proceedings upon the employer as follows;

"S.39-In any proceedings concerning unfair termination of an employee by an employer, the employer shall prove that the termination is fair".

In order to discharge the burden the employer must prove that the employee was terminated for a valid and fair reason and upon a fair procedure. In that regard s.37 of the ELRA reads as follows;

- "S. 37-(1) *It shall be unlawful for an employer to terminate the employment of an employee unfairly.*
- (2) ***A termination of employment by an employer is unfair if the employer fails to prove-***
- (a) ***that the reason for the termination is valid;***
 - (b) ***that the reason is a fair reason-***
 - (i) *related to the employee's conduct, capacity or compatibility; or*
 - (ii) *based on the operational requirements of the employer, and*
 - (c) ***that the employment was terminated in accordance with a fair procedure"***
[emphasis added].

On different occasions this Court had time to discuss about application of Section. 37 of the ELRA like it is the case here. See the cases of **Jimson Security Service v. Joseph Mdegela**, Civil Appeal No 152 of 2019, **Severo Mutegeki v. Rehema Mwasandube**, Civil Appeal No. 343 of 2019 and **National Microfinance Bank v. Leila Mringo and 2 Others**, Civil Appeal No. 30 of 2018 (all unreported).

As we said earlier on, before the CMA the respondent led no evidence at all as clearly shown on the record of appeal. That is where one Mzee Vedasto, the respondent's representative, prayed for the closure of the respondent's case without having produced any evidence. That request was made after the respondent had failed to produce witnesses on three previous occasions that is to say on 21/11/2016, 17/01/2017 and 02/02/2017. Given the fact that the respondent led no evidence, on his part the appellant had no burden to discharge and therefore his unfair termination claim remained unchallenged. We agree with Mr. Mashamba's submission that the High Court's decision was only based upon extraneous matters namely the opening statements, made and lodged by them. With respect therefore, we find Ms Kivea's contrary submissions clearly misconceived.

It follows, therefore, that given the evidence on record the respondent did not, in any way whatsoever prove, leave alone attempt to show that the termination was fair.

We are well aware of the existence of the respondent's opening statement at page 28 of the record of appeal, but that one had clearly

no evidential value and could not be acted upon in lieu of testimonial accounts of witnesses or documentary evidence. The respondent's opening statement remained, but it was not by way of evidence tested. The respondent may have had some witnesses to prove the fairness of the impugned termination but it is itself to blame for the course taken by its representative Mzee Vedasto, closing its case, rather surprisingly without leading any evidence.

When all is said, with greatest respect we wish to hold further that the learned judge was incorrect in her decision on three reasons; **(1)** In express terms one having waived his right to be heard, the fact remains that by no stretch of the imagination did the respondent prove that the reason and procedure taken for termination of the appellant's employment were fair **(2)** with respect to the respondent's case the High court's findings had no bearing on the record **(3)** as regards the respondent's case, the High Court just relied on assumed and or extraneous matters or facts.

Now that from the course taken by the respondent we are settled that it did not even show that the appellant was fairly terminated, it must have risked the consequences.

In the final analysis, we find merit in the appeal and allow it. Accordingly we quash the High Court's decision and set aside the decree. For avoidance of doubt, we restore the CMA's award with no order as to costs because it is a labour matter.

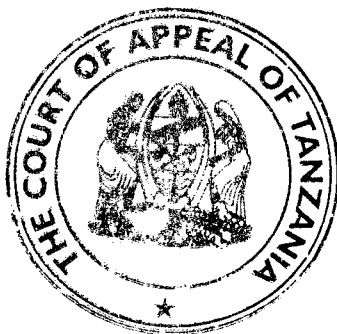
DATED at DAR ES SALAAM this 4th day of March, 2022.

G. A. M. NDIKA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

The Judgment delivered this 8th day of March, 2022 in the presence of Mr. Emmanuel Julius Mashambo, learned counsel for the appellant and Ms. Abbriat Kivea, learned counsel for the respondent.




G. H. Herbert
DEPUTY REGISTRAR
COURT OF APPEAL