



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

**(CORAM: NDIKA, J.A., KITUSI, J.A., And MASHAKA, J.A.)**

**CIVIL APPEAL NO. 163 OF 2020**

**PAN AFRICAN ENERGY TANZANIA LIMITED ..... APPELLANT  
VERSUS**

**JOHN MSIGALA ..... RESPONDENT  
(Appeal from the Judgment and Decree of the High Court of Tanzania, Labour  
Division at Dar es Salaam)**

**(Muruke, J.)**

**dated the 26<sup>th</sup> day of July, 2019  
in  
Labour Revision No. 688 of 2018**

.....

**JUDGMENT OF THE COURT**

20<sup>th</sup> March, 2023 & 4<sup>th</sup> January, 2024

**MASHAKA, J.A.:**

This is an appeal against the judgment of the High Court of Tanzania, Labour Division at Dar es Salaam (the High Court) in Labour Revision No. 688 of 2019 that revised and set aside an award made by the Commission for Mediation and Arbitration (the CMA). The High Court, in effect, upheld an unfair termination claim by John Msigala (the respondent) against Pan African Energy Tanzania Limited (the appellant). It primarily reasoned that since the misconduct the respondent was accused of was committed off-duty and outside the workplace, the appellant could not have lawfully

disciplined him for it. Displeased, the appellant now assails the above reasoning and finding.

The antecedents to this dispute are that the respondent was employed by the appellant in 2003 as a Senior Operator and Plant Controller. He was terminated on 2<sup>nd</sup> May, 2016 following being charged with four disciplinary offences, namely, poor work performance, gross insubordination, gross disrespect and verbal assault to the Site Manager, Andrew Hooper (DW2), his immediate supervisor. The Disciplinary Committee found him guilty as charged, but he was terminated for gross insubordination, gross disrespect, and verbal assault, the respondent having taken the view that the offence of poor work performance did not warrant termination.

It is common cause that the respondent was stationed to work at the appellant's gas plant at Songo Songo Island. The appellant's staff including the respondent resided at a permanent camp, about a kilometre away from the plant and that they and other appellant's guests used to eat at a dining hall at the camp.

The incident material to this matter occurred on 13<sup>th</sup> April, 2016 around 19:30 hours at the dining hall. It was the case for the appellant at the arbitration that DW2 approached the respondent inside the hall after the

latter had signed out from work. He queried the respondent for his alleged failure to keep the required standard of gas pressure in the export line, resulting in declining pressure. During the exchange between them in the presence of other employees, the respondent made derogatory remarks against DW2, in a high-pitched voice, saying that DW2 did not know what he was talking about. When DW2 urged him to show respect, he replied that DW2 was a foreigner with lesser rights and that he was due to leave the country and could not do anything to him.

The respondent denied having uttered any words disrespectfully. He averred that when he signed out from work the gas pressure had not reached any critical level. He blamed DW2, saying that he provoked him by using derogatory language against him.

The CMA dismissed the complaint on being satisfied, on the evidence on record, that the respondent was guilty of gross insubordination as he used pejorative language against his supervisor in the presence of other staff. The arbitrator considered, more importantly, that the respondent admitted in his testimony to have used derogatory and disrespectful language against DW2. Ultimately, having been satisfied that a proper procedure was employed by the appellant before the respondent was

dismissed, the CMA found the termination substantively and procedurally fair.

As hinted earlier, the High Court vacated the CMA's award. In its reasoning, the court referred to rule 12 (3) of the Employment and Labour Relations (Code of Good Practice) Rules, 2007, Government Notice No. 42 of 2007 (the Code of Good Practice) enumerating acts of misconduct that may justify termination. The court, then, reasoned and concluded as follows:

*"... the respondent's [witnesses] said that the insubordination happened at dining ... time after John Msigaia [had] signed off. To the best of my understanding, for insubordination to [happen], it must be during working hours and at the workplace. [The] dining hall used by the employees is not a [workplace] despite being used by the respondent's employees."*

It is evident from the excerpt, the High Court made three key findings; first, that for any misconduct, including gross insubordination, to occur, it must be committed during working hours and at the workplace. Secondly, that the dining hall located about one kilometre away from the gas plant was not a workplace despite being used by the appellant's employees as their common refectory. Thirdly, given that the alleged act of gross

insubordination happened at the dining hall and that it occurred when the respondent had signed out from his day shift, he could not be guilty of gross insubordination.

The appellant initially lodged four grounds of appeal. However, at the hearing, Mr. Timon Vitalis, learned counsel for the appellant, who was assisted by Mr. Rwekamwa Rweikiza, also learned counsel, abandoned two of the original grounds and argued the remaining two grounds, which we have rephrased as follows:

- 1. That the High Court judge erred in law for defining the term "workplace" so narrowly resulting in erroneous finding that the respondent's conduct did not amount to insubordination.*
- 2. That the High Court judge erred in law for limiting the definition of "workplace" based on time and place resulting in erroneous finding that the respondent did not commit gross insubordination.*

Furthermore, Mr. Vitalis addressed the Court on one additional ground of appeal, for which the Court granted leave in terms of rules 106 (3) (b) (ii) and 113 (1) of the Tanzania Court of Rules, 2009. The complaint was:

- 1. That the High Court judge erred in law in granting the respondent reliefs not sought and above what was sought in the CMA dispute referral Form No. 1 without hearing the appellant.*

Ahead of highlighting the written submissions he had lodged in support of the appeal, Mr. Vitalis stated that the two original grounds of appeal required the Court to determine two issues: one, whether gross insubordination, gross disrespect and verbal assault to a supervisor cannot be committed by an employee after working hours and outside of the workplace; and two, whether a dining hall commonly used by an employer's staff is a workplace.

On the first issue, Mr. Vitalis referred to rule 12 (3) of the Code of Good Practice and the Schedule thereto listing gross insubordination and assault on a co-employee, supplier, customer and so on as offences warranting dismissal. He contended that the law does not limit such disciplinary offences to acts that occur during working hours and at the work site only. It was his argument that the test, concerns the relationship between the complainant and the accused employee and its effect to the continued employment relationship, but not the place and time of the act constituting the misconduct. As to what constitutes gross disrespect or gross insubordination, he posits that everything depends on the particular facts of the case. The learned counsel relied on **Mthuthuzeli George Ndwanya v. South Africa Local Government Bargaining Council & 2 Others**, (JR853/2011) [2013] ZALCJHB 2 (7 January 2013) where the Labour Court of South Africa

held that the conduct of challenging a superior in front of other employees undermines the authority of the superior and constitutes the offence of insubordination. Further reference was made to two decisions of the Labour Appeal Court of South Africa: **Sylvania Metals (Pty) Ltd v. M C Mello N.O. & 2 Others** (JA83/2015) [2016] ZALAC 52 (22 November 2016) and **Cashbuild (Pty) Ltd v. Poto N.O. & 2 Others** (JA111/2019) [2021] ZALAC 4; [2021] 6 BLLR 565 (LAC); (2021) 42 ILJ 1441 (LAC) (2 March 2021). Concluding on the first issue, Mr. Vitalis was fervent that the respondent's responses to the queries made by DW2 showed disrespect and that his conduct amounted to gross insubordination warranting termination consistent with rule 12 (3) (f) of the Code of Good Practice.

Regarding the second issue, Mr. Vitalis submitted rather tersely, that no law barred DW2, as the respondent's immediate supervisor, from querying his supervisee over work-related matters at a dining hall located away from the work site. He is emphatic that the dining hall commonly used by the staff was a workplace in the circumstances of the cases.

Rebutting on behalf of the respondent, Mr. Elisaria J. Moshia, learned counsel, assisted by Mr. David Ndossi, also learned counsel, supports the High Court's decision. He prefaces his argument by referring to Black's Law

Dictionary, 10<sup>th</sup> Edition as well as the Labour Appeal Court of South Africa's decision in **Motor Industry Staff Association & Another v. Silverton Spraypainters and Panelbeaters (Pty) Ltd & 2 Others** (JA 5/2011) [2012] ZALAC 42; (2013) 34 ILJ 1440 (LAC) (31 December 2012) on the definition of "insubordination." Insubordination, he contends, is a wilful disregard of an employer's instruction and or an act of disobedience to proper authority. He acknowledged that in **Motor Industry Staff Association** (*supra*) it was stated that where insubordination was gross, in that it was persistent, deliberate, and public, a sanction of dismissal would normally be justified.

Applying the above position to the facts of the case, Mr. Moshia contended that when the respondent was confronted by DW2, he did not disobey or disregard any order issued by DW2 and on that basis, there was no insubordination at the material time. Referring to the appellant's Code of Conduct and Ethical Practices, Mr. Moshia claimed that the Code does not cover acts or conduct of employee during off-duty hours. Citing rule 12 (1) (a) and (b) of the Code of Good Practice, it was his submission that an employer must show that the rule the employee contravened regulates conduct relating to employment and that the rule is reasonable, clear, and unambiguous, that the employee was aware of it, that the rule has been

applied constantly and that termination is an appropriate sanction for contravening it.

Mr. Mosha argued further that what an employee does off-duty is of no concern to his employer and that he has no right to institute any disciplinary proceedings against the employee unless the off-duty misconduct constitutes a criminal offence or where the employee's behaviour involves gross dishonesty or corruption, or where the nature of such off-duty misconduct is to destroy the relationship of trust between the employer and the employee. Looking at what happened inside the dining hall, Mr. Mosha argued that the heated conversation the respondent had with his supervisor fell short of what could have destroyed the working relationship between him and his employer, a relationship that had spanned over thirteen years. On applicability of **Mthuthuzeli George Ndwanya** (*supra*) relied upon by Mr. Vitalis, Mr. Mosha argued that while the cited case involved on duty misconduct the instant case involves off-duty transgression. Additionally, unlike his counterpart in **Mthuthuzeli George Ndwanya** (*supra*), the respondent in the instant case was remorseful as he regretted what happened in the dining hall.

Turning to the second issue, Mr. Moshia asserts that the dining hall was not a workplace and that it was wrong for the supervisor to confront the respondent at the hall querying him over work-related matters. It is his contention that a workplace is a place where a person works for a living or gain.

We have dispassionately examined the record of appeal and considered the competing arguments of the learned counsel for the parties. At first, it should be stressed that the High Court vacated the CMA's decision on the sole ground that the act of gross insubordination in issue did not amount to a disciplinary offence because it occurred off-duty and outside the workplace. The court, therefore, did not reverse the CMA's finding that the respondent made the utterances complained of and that he owned up to the transgression as he eventually expressed his remorse for the act. Consequently, what is germane for our determination is the question whether for any misconduct, including gross insubordination, to occur, it must be committed during working hours and at the workplace.

We find it a logical starting point to extract rule 12 of the Code of Good Practice governing the fairness of the reason of termination. It stipulates as follows:

*"12.-(1) any employer, arbitrator or judge who is required to decide as to termination for misconduct is unfair shall consider-*

*(a) Whether or not the employee contravened **a rule or standard regulating conduct relating to employment.***

*(b) If the rule or standard was contravened, whether or not-*

*(i) it is reasonable;*

*(ii) it is clear and unambiguous;*

*(iii) the employee was aware of it, or could reasonably be expected to have been aware of it;*

*(iv) it has been consistently applied by the employer; and*

*(v) termination is an appropriate sanction for contravening it.*

*(2) First offence of an employee shall not justify termination unless it is proved that the misconduct is so serious that it makes a continued employment relationship intolerable.*

*(3) **The acts which may justify termination are:***

*(a) gross dishonesty;*

*(b) wilful damage to property;*

*(c) wilful endangering the safety of others;*

*(d) gross negligence;*

*(e) assault on a co-employee, supplier, customer or a member of the family of, and any person associated with, the employer; and*

*(f) **gross insubordination.***"[Emphasis added]

We have emboldened the text above to accentuate two key points. First, that in terms of rule 12 (1) (a) above a disciplinary offence must arise from a violation of a rule or standard regulating an employee's conduct relating to his employment. It means, therefore, that there must always be a link between a misconduct and the employment relationship regulated by the rule or standard alleged to have been contravened. Secondly, in consonance with rule 12 (3) above, any of the six enumerated disciplinary offences may justify termination even if it is a first offence committed by the employee.

In its totality, rule 12 above, in its letter and spirit, does not limit any of the enumerated disciplinary offences to acts that occur during working hours and at the work site only. Even though an employee's private life should be separated from his work life, we are cognizant that there is a very thin line between them. In our view, an employee's misconduct off-duty or

outside the workplace may be a reason for termination under certain circumstances if it is likely to cause serious damage to the business of the employer. With respect, the learned High Court judge slipped into error by restricting, without any exception, the employer's entitlement to discipline an employee to such disciplinary offences occurring during working hours and at the workplace only.

To illustrate our standpoint, we wish to refer to the jurisprudence developed in South Africa which we find quite instructive. In **Nhlanhla Christopher Makhoba v. Commission for Conciliation, Mediation and Arbitration and 2 Others** (1280/17) [2021] ZALC 11 (13 September 2021), the Labour Court of South Africa, following its earlier decision in **Biggar v. City of Johannesburg (Emergency Management Services)** 2017 38 ILJ (1806) (LC), stated, at paragraph 18, that:

*"[18] In **Biggar v. City of Johannesburg (Emergency Management Services)**, the Labour Court noted that the courts have long acknowledged that **disciplinary action may be taken against an employee for conduct committed outside the workplace if it has a bearing on the employment relationship. The court found that a sufficient link existed between the***

*racism and the employment relationship despite the fact that the acts of racism did not occur at work. Therefore, the court was convinced that even though the acts of racism had taken place outside the workplace, outside the ordinary working hours and not in the execution of duties, 'this was not beyond the remit of the employer's disciplinary powers.'*" [Emphasis added]

Having referred to its earlier decisions in **Dolo v. Commission for Conciliation, Mediation and Arbitration and Others** 2011 32 ILJ 905 (LC) and **Edcon Limited v. Cantamessa & 2 Others** [2020] 2 BLLR 186 (LC) as well as the decision of the Labour Appeal Court of South Africa in **Hoechst (Pty) Ltd v. Chemical Workers Industrial Union & Another** (1993) 1449 (LAC), the aforesaid court concluded that an employer can exercise discipline over an employee for any misconduct committed off-duty or outside the workplace as long as there was a connection between his conduct and the employment relationship. Put differently, if there is a link or nexus between the conduct complained of, the employee's duties and the employer's business, the employer will be entitled to take a disciplinary action against the employee for any misconduct committed off-duty or away from the workplace.

We stated earlier that in the instant case, the High Court did not reverse the CMA's impeccable finding that the respondent uttered disrespectful words towards his immediate supervisor and that he owned up to the transgression following his eventual expression of remorse for the act.

We agree with Mr. Vitalis that the respondent's conduct was calculated at challenging his superior in front of other employees and that it effectively undermined DW2's authority. DW2, who, as the supervisor, had a legitimate cause to find out why the respondent had neither taken proper measures to avert the declining gas pressure in the export line nor did he report the problem to his immediate supervisor. But, the respondent, in response, unleashed a verbal defiance showing rudeness and extreme disrespect. That conduct, no doubt, constituted gross insubordination, as found by the CMA, even though it was committed off-duty. The fact that the offence was perpetrated in the dining hall away from the usual workplace – the gas plant – is of no consequence. It is of note that the act was committed in the presence of some of the appellant's staff and guests. Evidently, there is a sufficient nexus between the respondent's conduct and the business of the appellant given that the respondent's act aimed at weakening his superior's authority. In the premises, we are constrained to decide the first issue in the appellant's favour.

The foregoing determination is certainly dispositive of the appeal. We, therefore, find no pressing need to deal with the second issue as well as the additional ground of appeal.

In conclusion, we allow the appeal and proceed to vacate the High Court's judgment and restore the CMA's award. We make no order as to costs considering that this matter originates from a labour dispute.

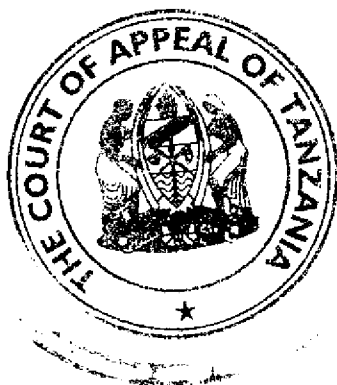
**DATED at DAR ES SALAAM** this 3<sup>rd</sup> day of January, 2024


G. A. M. NDIKA  
**JUSTICE OF APPEAL**

I. P. KITUSI  
**JUSTICE OF APPEAL**

L. L. MASHAKA  
**JUSTICE OF APPEAL**

The Judgment delivered this 4<sup>th</sup> day of January, 2024 in the presence of Mr. Tumain Michael, learned counsel for the Appellant and Mr. Dennis Lewis, learned counsel for the Respondent, is hereby certified as a true copy of the original.



  
R. W. CHAUNGU  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**