IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LABOUR DIVISION)

AT ARUSHA

LABOUR REVISION NO. 33 OF 2022

(Originating from Employment Labour Dispute No. CMA/ARS/121/21/75/2021)

KEPHACE ELIBARIKI KIVUYO.....APPLICANT

VERSUS

SGA SECURITY TANZANIA LIMITED.....RESPONDENT

JUDGMENT

31/10/2022 & 30/11/2022

GWAE, J

Before the Commission for Mediation and Arbitration of Arusha at Arusha, the applicant, Kephace Elibariki Kivuyo lodged his complaints against the respondent, SGA Security Tanzania Limited. The applicant sought reinstatement to his employment without loss of his entitlements thereof from the date of termination to the date of compliance with the arbitral award.

Brief facts giving rise to the dispute between the parties are as follows; the respondent was employed by the applicant in 2019 as a senior supervisor and he was promoted to the position of Operation Officer, the position which he held till when he was terminated on 15th March 2021 on

the ground of gross dishonest. The disciplinary offence against the applicant being a failure to report theft incidence to his superior officer (Guarding Security Manager), the incidence is alleged to have befell at Enza Zaden Africa on 14th day of December 2020 despite the fact he received the information from security guard and visited the guard site ("Lindo"). It was however the applicant's assertions that, he had not committed the said misconduct as he gave necessary information relating the theft incidence to his superior office (Victor Gaudence-DW2) through email on 15th December 2020.

Desciplinary Hearing Committee finally gave its verdict that, the applicant be interdicted or suspended (Asimamishwe kazi) through the respondent's letter dated 15th March 2021 for the misconduct of gross dishonest to his employer through the respondent's letter. Therefore, he was paid the following terminal benefit; March 2021 salary for the worked days, overtime allowance, leave pay and certificate of service. In its analysis of the parties' evidence adduced before it, the Commission entirely dismissed the dispute by stating that the applicant had admitted the theft incidence to have occurred and that, the respondent followed fair procedure in terminating.

Aggrieved by the award procured by the Commission on 25th day of February 2022, the applicant filed this application praying for the following reliefs;

1. That, this court be pleased to revised and set aside the award of the Commission in the Employment Dispute No. CMA / ARS /121/21/ 75/2021
2. Any other order (s) this court deems fit and just to grant

The applicant's grounds on which the above reliefs are sough are as follows;

i. That, the award was tainted and riddled with fundamental misdirection and no-direction in law and facts. Thus, occasioning miscarriage of justice to the applicant

ii. That, the arbitrator erred in law and fact for failing to properly analyze and evaluate the evidence adduced by both parties particularly that of applicant

iii. That, the arbitrator erred in law and fact for failing to consider issues that were never disputed by both parties

iv. That, the arbitrator erred in law and fact for reaching to a conclusion based on matters that were never raised by both parties and without a proper proof to that effect

v. That, the arbitrator erred in law and fact for failure to construe the law and authority

vi. That, the arbitrator erred in law and fact for failure to consider the most disputable concern and the applicant's pleadings in CMA F1 accordingly

On 31st day of October 2022 when this matter was called on for hearing before me, Mr. Bashange, personal representative and Mr. Nicodemus Mbung'a, the learned advocate appeared representing the applicant and respondent respectively.

Supporting the applicant's application, Mr. Bashange initially prayed for the court's adoption of the applicant's sworn affidavit and proceeded arguing ground 1, 2 and 3 together by stating that, the accusations on gross dishonest were not proved to the required standard by referring this court to DE4 and DE5. He added that, there was not cogent evidence establishing the occurrence of theft except mere assertions. He urged this court to closely look at the CMA's record especially page 10 of the typed proceedings.

The applicant's personal representative went on urging that, the testimony of DW2 is nothing but hearsay evidence. He referred to the case of **Isack Sultani vs. North Mara Gold Mines Ltd**, Consolidated

Labour Revision Application No. 16 and 17 of 2017 (unreported) at page 19 and 20 where it was stated that hearsay evidence is not admissible in the eye of the law.

He further stated that, Disciplinary Hearing Form (DE5) is not consistent with the evidence adduced by DW2 who purported to be the prosecutor but the documentary evidence is not to that effect. Moreover, the applicant's representative he added that, in DE5 there is no penalty of termination of employment. It was the opinion of Mr. Bashange that, DW2 had turned to be complainant and a judge of his case (See **Leonard Samson Mirondo vs. Eden Nursery,** Labour Revision No. 10 of 2018 (unreported).

Likewise, Mr. Bashange argued that, neither DW3, investigator did not connect the applicant with the offence of theft via investigation report (DE8) which does not connect the applicant directly nor did the applicant fail to report the incidence since he reported the same to his superior officer. He also argued that, the evidence 0f DW2 and DE8 is not consistent. He buttressed his submission to the case of **Marwa Nyaiki vs. Geita Gold Mines Ltd**, Revision no 42 OF 2019 (Mwanza) and that, the arbitrator did not take into account of the evidence adduced by the applicant.

Concerning procedural aspect of law, the applicant's representative argued that, the applicant was denied the right to a representation during hearing conducted on 5th day of March 2021 and by not being given the outcome of his appeal and minutes of disciplinary hearing. Thus, contravention of Guidelines No. 42 /2007 and Paul Chando. Guidline No.4. More so, Mr. Bashange argued that, the Disciplinary Committee merely suspended the applicant and not terminated him ("Kumsimamisha kazi") and that, there is no proof if the applicant was paid his terminal benefits after termination as depicted in the termination letter.

In his response, Mr. Mbung'a argued that, the arbitrator did consider the issues of substantive and procedural fairness and finally he properly arrived at his decision that, the applicant had failed to report the theft incidence. He also argued that, the investigation report was a mere part of the respondent's evidence that led to the applicant's termination of his employment.

Mr. Mbung'a also submitted that the word "kusimamisha kazi" as appearing in the disciplinary hearing form, denotes termination. However, he argued that, if the respondent terminated the applicant's employment before hearing of his appeal and outcome thereof, that, termination would be illegal. Nevertheless, he argued that, in this dispute the applicant did

not appeal as there is no evidence that the applicant applied for the same but he was informed of such right as revealed by the form itself.

The respondent's counsel went on stating that, the respondent paid the applicant his terminal benefits as per DE8 and PE9 as well as the certificate of service was issued. He finally prayed this application be dismissed for want of merit.

In his rejoinder, Mr. Bashange reiterated his submission in chief that, there would not be a gross misconduct whereas there was no proof of theft incidence. He further stated that, it was not possible to commence the disciplinary proceedings without a complainant. The omission, which in his view leaves a lot to be desired.

Having briefly outlined what transpired before the Commission and this court, it is the observation of this court to determine whether the Commission was justified in holding that there was sufficient proof that, the applicant failed to report the theft incidence to the higher authority and whether the applicant truly appealed against the decision of the Disciplinary Hearing Committee.

In the **1st issue**, in order to justly determine this issue, I have to be guided by the records, looking at the records especially proceedings. it is

evident that, there was information first by the security guard to the applicant who also informed Zonal Coordinator, DW2 (Victor Gaudence) relating to theft incidence suspected to have occurred at the place known as Enza Zaden Africa. However, it is not very clear, if the applicant did not report as alleged by the respondent. I am holding so simply because DW2 when cross examined, he stated that, the applicant was supposed to report the theft occurrence but when cross examined, he vividly stated that, there was no theft incident ("Nimefanunua kwamba hakukuwa na tukio la aina yoyote") as vividly reflected in page 9 of the typed proceedings. I have also considered the fact that, the report on theft incidence would be made in any manner including email since DW2 when asked as to the mode of giving report he said any mode including email (See page 10 of the typed proceeding). The applicant's evidence before the Commission is to the effect that, he reported the incidence to DW2 through e-mail. Equally, when I carefully look at the proceedings before the Disciplinary Hearing Committee it is obvious that, the report was given either orally or in writing. Had the report not furnished as required, DW2 could not have said that, there was no theft incidence.

Consequently, it was the applicant who complained against the said Mollel on the incidence occurred 14th day of December 2020.

Similarly, I have gone through the investigation report, DE8 and found that, it is an indication that, the applicant was involved and his statement was recorded as required by the law. This position of law was stressed by this court (**Wambura, J**) sitting at Mwanza in **KCB (T) Limited vs. Dickson Mwikuka**, Revision No 45 of 2013 delivered on 26th September 2013 reported in Labour Court Case Digest No. 132 of 2013 where it was stated and I quote;

> "The auditor did not interview the respondent simply because his mobile phone was not reachable raises a lot of doubt as to how the investigation were conducted and how the information was obtained and relied upon. The auditor had to hear".

In this instant dispute, the investigator heard the applicant as revealed in the report. Nevertheless, the same is not indicative that, the applicant failed to report the theft incidence. Even by probing annextures in the investigation report, none suggests that, there was theft incidence reportable to higher authority except after the letter written by Mr. Lomanyaki dated 6th day of February 2021 and addressed to General Manager Enza Zaden Africa disclosing that, there was theft incidence occurred on 14th December 2020. Since the theft was not discovered on 14th December 2020 and since the report itself is confusing when it indicates that, the applicant to be accountable for his "**legality**" of his

actions on handling and reporting to his superior, it cannot therefore form the basis of the applicant's guilt of misconduct.

The evidence in support of the respondent's allegation that, he did not report theft incidence ought to have been sufficiently presented at the hearing as required under Rule 13 (5) of the GN. No. 42 of 2007 unlike the scintilla evidence adduced by the respondent. The respondent as an employer had a burden of proving that she terminated the applicant for a clear and valid reason (s) (See Section 37 (2) of the ELRA, Article 9(2) of the ILO Convention No. 158 of 1982 as well as section 110 of the Tanzania Evidence Act, Cap 6, R. E, 2019).

The holding by the arbitrator that, the applicant cannot escape from responsibility since he was at the scene of crime is unfounded and unsupported by evidence adduced during hearing. Being at the scene or having visited the scene of crime does not necessarily make the one who was either present or who visited the scene of crime after commission of an offence to mandatorily know or be aware of the commission of the offence by another person.

Had the Hon. Arbitrator objectively assessed the nature and quality of evidence given by the parties he would not have held that, the applicant did not dispute to have failed to report the incidence. The Commission

therefore erred in law by not analyzing the evidence before it as a whole (See the judicial precedent in the case of **Jonas Nkize vs. Republi** (1992) T. L.R 213).

Regarding the **2nd issue,** it is the court's observation that, the applicant did appeal to the higher Disciplinary Hearing Authority as asserted by him. I am therefore unhesitatingly of that view simply because PE4 reveals that, the applicant did vividly appeal on 12th March 2021 and his appeal was duly received by the respondent on the same date since it bears signature of the recipient, date on which it was received and the respondent's seal.

Worse still, the HRO, DWI responsible for administration issues did testify before the Commission that, the applicant appealed and his appeal was heard as depicted at page 10 of the typed proceedings ("S: Alipata nafasi ya kuomba rufaa, J: Ndiyo na alisikilizwa). The evidence of DWI is however inconsistent with that of DW2 who said the applicant did not appeal against the decision of the Disciplinary Hearing Committee and that he was terminated after his failure to appeal ("Ndiyo baada ya kutokata rufaa").

Considering the apprehended contradictions of evidence adduced by the respondent's witnesses during arbitration. Therefore, this court

finds that, the evidence given by the applicant is not credible and consistent whereas the evidence adduced by the applicant on the issue in controversy on whether he appealed or not to the higher authority is more credible.

Thus, it was wrong for the respondent to terminate the applicant's employment before hearing and termination of his appeal. Terminating the applicant before hearing and determination of his appeal amounts to a serious irregularity since it is paralleled with terminating an employee immediately after lodging a disciplinary charge against him or her without hearing. It was therefore appropriate to await the outcome of his appeal notwithstanding whether the outcome would the same or not. In **Donai Kilala vs. Mtwara District Council** (1973) LRT 19 where is was correctly held and I quote;

> *"As it can be seen, there is nothing mysterious about natural justices, it is just fair play. These rules of wise. The rule of fair play is not entirely of foreign origin. The Baganda have a saying "Do not decide the girl's case until you hear the boy."*

In our case, it was prudent for the respondent to wait for the result of the applicant's appeal instead of rushing into terminating the applicant's employment. I have further considered the fact, that, the outcome of the

Disciplinary Hearing Committee after hearing was applicant's interdiction and not termination. The respondent's counsel attempted to convince the court that the word "suspension or interdiction is the same as termination, with due respect with the learned counsel for the respondent, in my firm, the term, "termination of employment" is not the same as the term "interdiction of an employee".

The word "termination" is synonymously used to mean, a dismissal of the employee from his employment. On the other hand, the term "interdiction" entails that, an employee is suspended from employment pending investigation and or any disciplinary proceeding. The 2nd ground is also found meritorious.

Before type of, I would also wish to respond to the applicant's complaints that he was denied a right of representation during disciplinary hearing proceedings. I have examined the records of the Commission and found that this type of the complaint is misplaced since the Disciplinary Hearing Form clearly indicates that the applicant had a representative known by name of Justine E. Herman.

I have further considered the applicant's complaint that, DW2, the respondent's Zonal Manager played a role of a judge and prosecutor /complainant. I am alive of the principle of rules of against bias. Rules

against bias is one of the principles of natural justice. This principle has been stressed in a chain of judicial decisions for instance in **Jimmy David Ngonga vs. Insurance Corporation Ltd** (1994) TLR 28, this court stated;

> "Since the General Manager, who was in the nature of a prosecutor, was present during the deliberations of the Board which dismissed the applicant, the proceedings of the Board were vitiated by bias."

In our instant dispute, one Victor Gaudence who appeared as DW2 during hearing before the Commission and before the Disciplinary Hearing Committee he appeared as a complainant and this position is plainly reflected by the proceedings in both quasi-judicial bodies. Thus, DW2 never appeared as a judge of his own case since the Disciplinary Hearing Committee was chaired by one Ephraim Kisanga. Therefore, it follows that, the applicant's complaint in this regard is nothing but an afterthought.

In the light of the foregoing deliberations, the applicant's application is meritorious, the same is granted. The award of the Commission consequently revised and set aside. The applicant, though sought an order of the court reinstating him to his employment, but I am of the view that, the circumstances of the case especially, the parties' industrious relations are no longer compatible to smooth services delivery. In that

view, the applicant shall be entitled to **twenty-four (24)** months' salary compensation. No order as to costs is made since this dispute is labour.

It is so ordered

DATED at **ARUSHA** this 30th day of November 2022

M.R. GWAE
JUDGE

Court: Right of appeal explained

M.R. GWAE
JUDGE
30/11/2022