IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 168 OF 2021

BACKER SEUCHAGO ..... APPLICANT

VERSUS

MBALIMBALI LODGES & CAMPS LIMITED ..... RESPONDENT

(From the decision of the Commission for Mediation and Arbitration of DSM at Ilala)

(Mayale: Arbitrator)

Dated 25th March, 2021

in

REF: CMA/DSM/ILA/58/2020

JUDGEMENT

25th April & 21st July 2022

Rwizile J

This application emanates from the decision of the Commission for Mediation and Arbitration (CMA) in Labour Dispute No. CMA/DSM/ILA/58/2020. This Court has been asked to call for the records and proceedings of the CMA and revise the same.

The history background of this case is; the applicant was an employee of the respondent since November, 2011 in a position of booking consultant. On 01st November, 2019, he and his co-workers were reported to the police by the respondent alleged to have committed theft by agent under RB No. MS/IR/6496/2019. On 27th November, 2019 the respondent ordered the applicant to handover all office equipment and tasks and wanted him to stop going to work until when the matter would be determined. From suspension to the date of termination, he had not received his salaries.

On 11th December, 2019 he received two letters, one being for suspension and the other, a notification for the disciplinary hearing. He was later terminated while there was a pending criminal case. He was dissatisfied with the decision and referred the matter to CMA. The award was given partly in his favour. Aggrieved with it, he filed this application in protest.

The applicant's affidavit stated grounds for revision. The respondent opposed by filing a counter affidavit sworn by Fayaz Karim, the principal officer. Legal issues for determination: -

i. *Whether the commission was right to hold that criminal charges against the applicant were not initiated by the employer.*

ii. *Whether the employer was justified to initiate disciplinary proceedings while there were pending criminal charges against the applicant over the same matter.*

iii. *Whether offences against the applicant were proved in the disciplinary hearing.*

iv. *Whether exhibit D-6 (minutes of the disciplinary hearing) had any legal force in absence of the applicant's signature.*

v. *Whether the commission properly analysed evidence from both parties.*

vi. *Whether the commission was correct to rely on hearsay and uncorroborated evidence and*

vii. *Whether the commission awarded reliefs in accordance to the law.*

The application was heard by written submissions. The applicant was represented by Mr. Yohana Julius Ayall, learned Advocate, whereas the respondent enjoyed services of Mr. Benjamin Mtwanga, learned Advocate.

Mr. Yohana submitted that there were no reasons for termination as there was no investigation conducted by the employer instead the respondent relied on the police investigation. According to him, there was no evidence adduced at CMA or at the disciplinary hearing to prove misappropriation done by the applicant and the loss caused to the respondent. He stated

further that exhibits D-6 (minute of the gimmick disciplinary hearing) and exhibit D-7 (which shows the applicant failed to defend himself beyond reasonable doubt). To support his submission, the learned counsel referred the case of **Tanzania Local Government Workers Union (TALGWU) v Sospeter Gallus Omollo**, Revision No. 265 of 2020 High Court.

Mr. Yohana continued to submit that the applicant's connection to the evidence based on the hearsay of the co-worker and the Managing Director who were not called to testify. He said, that during disciplinary hearing the burden of proof was shifted to the applicant to prove unfair termination. He stated that the three offences charged of gross dishonesty, causing serious loss to the company and misappropriation of the company's fund were not proved. He argued, the duty of the employer to prove fairness of termination is governed by section 39 of the Employment and Labour Relations Act [ELRA]. The learned counsel was of the view further that, section 39 is to be read together with Guideline 4(11) of Employment and Labour Relations (Code of Good Practice). He stated that the respondent failed to prove by not tendering evidence to that effect.

He cited the case of **China Railway Jiang Engineering v Sharifa Juma**, Labour Division, Dar es Salaam, Revision No. 91 of 2009 to support his submission.

Submitting on the procedure for termination, Mr. Yohana said that it was not fair. He stated that the applicant was terminated while there were still a pending criminal investigation over the same matter which is contrary to section 37(5) of ELRA and section 70 of the Interpretation of Laws Act, [CAP 1 R.E. 2019]. In support, he cited the cases of **Festo Ngozi Ndalemye & Leonard Paul Mghamba v Knight Support (T) Ltd**, Labour Division, Dar es Salaam, Reference No. 1 of 2010, **Stella Manyahi and Another v Shirika la Posta**, Labour Division, Dar es Salaam, Reference case No. 02 of 2010 and **Desktop Production Ltd. v Joyce Dionise Katto**, Labour Revision No. 103/2019 [2020] TZHCLD 408.

He stated that the Director instigated the respondent's case, by ordering investigation and initiating other processes while he presented the case in turn. To him, this was against the procedure as he was the judge in his own case as held in the case of **Janeth David Mashingia v National Housing Corporation**, Revision No. 238 of 2018 [2020] TZHCLD 198. He stated further that the applicant was not given reasonable time to

appeal internally as the outcome of the hearing was communicated in the termination letter and that the minutes of the disciplinary hearing (exhibits D-6) was signed by the applicant. To support this position, he cited the case of **Exim Bank Tanzania Ltd v Nyamhanga Mhagachi**, Revision No. 14 of 2019 [2020] TZHC 1349 and Guideline 4 of (Code of Good Practice) Rules of 2007.

Mr. Yohana continued to submit that the suspension letter admits that the repayment of the loan issued to the applicant by the respondent was a salary deduction of TZS 400,000.00 per month contrary to section 28(1)(b) and (2)(e) of ELRA. He stated that the deduction made was more than three quarters of the whole remuneration that he was entitled and not withholding the whole salary. He continued to state that, the applicant has to be paid 9 years severance pay, unpaid salary, one month salary in lieu of notice and one month salary, all these entitlements were disregarded by the arbitrator and did not state reasons for doing so. He prayed for the payment to be done as per CMA Form No. 1 and as per sections 40(1)(c), (2) and 44 of ELRA.

In reply Mr. Benjamin submitted that the applicant confessed the allegations and asked for a forgiveness. The learned counsel went on submitting that the CMA found no proof that the respondent had a good

cause to terminate the applicant. He submitted further that the applicant did not tender any documentary evidence proving that there was a police investigation or that the respondent reported the it to the police. Responding on procedural irregularity, it was admitted that the Managing Director was the chairman of the meeting and also the complainant. According to Mr. Benjamin, this was wrong in the eyes of law.

On reliefs given, Mr. Benjamin stated that due to corona pandemic, businesses were disrupted, altogether tourism industry was disturbed. In his view, the arbitrator was right to award six months. To support his submission, he cited the case of **Ultravetis Ltd v Baraka Emmanuel Lema**, Revision Application No. 26 of 2020, which held that when making reliefs, the arbitrator has to consider special circumstances such as the pandemic diseases such as Corona virus which brought economic crisis worldwide. And in the case of **Felician Rutwaza v World Vision**, Civil Appeal No. 213 of 2019 which held that when unfair termination is proved only on procedure, the statutory stated reliefs can be reduced. The learned counsel therefore prayed, the application be dismissed.

Having given careful thought to the submissions of the parties. I have to state that, the application hinges on whether termination was fair or not. In law this fact is governed by section 37(2) of the ELRA, which clearly

states that, for termination of employment to be considered fair, the employer has to prove, that there were valid reasons for termination and that the reasons were also fair. The law further elaborates that, fairness of reasons for termination has to related to the employee's conduct, capacity or compatibility and/ or has to be based on the operational requirements of the employer, and that the employment was terminated in accordance with a fair procedure. This above position was also reached in the case of **Tanzania Revenue Authority v Andrew Mapunda,** Labour Revision No. 104 of 2014, where this court restated the same principle as follows:

> *"... it was established principle for the termination of employment to be considered fair it should be based on valid reasons and fair procedure."*

This duty, as submitted, is cast on the employer as provided under section 39 of the ELRA. In this matter, the arbitrator found that the procedure for terminating the applicant's employment was not followed. The same was not disputed by both parties. I, also, find in records enough evidence showing so. It shows that the disciplinary hearing was conducted by the Director who according to the record, was the complainant and as well initiated the proceedings and sat to decide the allegations. This is against

Guideline 4(2) of Employment and Labour Relations (Code of Good Practice) G.N. No. 42 of 2007 which states: -

> *"The chairperson of the hearing should be impartial and should not, if possible, have been involved in the issues giving rise to the hearing. ..."*

This is proved by exhibit D6 which is the minutes of the disciplinary hearing and exhibit D7 which is the termination letter. This shows the procedure for termination was unfair, it contravened Guideline 4(7) of G.N. No. 42 of 2007 which provides: -

> *"After the hearing of the evidence, the chairperson should make a decision based on a balance of probabilities as to whether the employee is guilty of the allegation or not. ..."*

It is on records that the evidence used to terminate the applicant is that, he was mentioned by co – workers namely Canon and Timothy who took client's money. It was stated that applicant confessed the offences charged to the Managing Director and admitted how the transaction of money was from Canon to the applicant. There is no such evidence in the record which shows the same confessed.

Further, evidence does not show any client appeared to testify before disciplinary hearing on the same fact. There was no statement which was taken as evidence from the police to justify monitory transactions from one Canon to the applicant. Apart from that, the respondent also failed to mention and prove as the law requires the exact amount sent by the client to Canon and from Canon to the respondent in order to have an assessment on the two facts in the alleged offences.

I therefore tend to defer with the arbitrator's findings that reasons for termination were validly proved against the applicant. Since the respondent as the employer has the duty to prove fairness of termination, the evidence produced failed to prove so. In such account, I am of determination that the applicant's termination was substantively and procedurally unfair.

On the issue of deduction of the applicant's salary, even the applicant himself does not dispute the fact that he took a loan from the respondent. For that matter it was supposed to be paid. I therefore find it reasonable to hold his salary as the security to the loan taken by the applicant.

Going to reliefs, since it has been found that termination of the applicant was both substantively and procedurally unfair, the CMA award is quashed and the following reliefs are given: -

1. Compensation of 12 months remuneration as provided under Section 40(1)(c) of the ELRA, which is the same of TZS 21,070,800.00 taking that the monthly salary was TZS 1,755,900.00
2. Notice of termination which is one month salary, the sum of TZS. 1,755,900.00 and
3. Certificate of service as provided under section 44(2) of the ELRA.

In sum, the applicant is to be paid TZS. 22,826,700.00. Thus, this application is successful. No order as to costs.

A.K. Rwizile

JUDGE

21.07.2022

The Judgement has been delivered in the absence of both parties, this 21st day of July 2022.

MAHAKAMA KUU YA TANZANIA (The High Court of Tanzania) (Labour Division) DIVISHENI YA MAHAKAMA YA KAZI

A.K. Rwizile

JUDGE

21.07.2022