IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 674 OF 2018

BETWEEN

TANZANIA PORTLAND CEMENT CO. LTD.....APPLICANT

VERSUS

FRANK MAZIKU..... RESPONDENT

JUDGMENT

Date of Last Order: 02/03/2021
Date of Judgment: 23/04/2021

A.E MWIPOPO, J.

This is revision application against the Commission for Mediation and Arbitration (CMA) in Labour Dispute No. DSM/KIN/R.490/14/618 which was delivered on 31/08/2018 by Hon. Nyagaya, P., Arbitrator. Tanzania Portland Cement Co. Ltd, the applicant herein, is applying to this Court for an order in the following terms:-

1. That, this Court be pleased to revise and set aside the whole proceedings and award of the arbitrator in the CMA Labour Dispute No. DSM/KIN/R.490/14/618 delivered on 31st August, 2021 by Hon. Nyagaya, P., Arbitrator.

2. That, this Court be pleased to grant any other relief(s) as it deems fit.

The application is accompanied with Chamber Summons and is supported by Affidavit sworn by Jesse Shuma, Applicant's HR Director. The Applicant's Affidavit contains three grounds for revision in paragraph 13. The grounds are as follows hereunder;

i. The award is illegal, has irregularities and does not reflect the evidence and findings of the Commission as the Arbitrator exhibited biasness by holding that there was no proof that there was communication with TRA in total disregarding to the Applicant's evidences.

ii. Whether it is legally correct for an employee to be represented by a third part Trade Union while he is a member of another Trade Union. Whether this does not bring about disrupt of CMA proceedings. The Respondent was a member of TUICO and he was represented by TUPSE.

iii. The award is contradictory, contains irregularities and contains errors material to the merits of the subject

matter, for ordering payment of monetary award without proofs and ascertainment of the Respondent's salary.

The brief history leading to the present application was that: The Respondent namely Frank Maziku was employed by the Applicant on 12th May, 2008 as Process Engineer for unspecified period. The Respondent was terminated from the employment for misconduct on 20th August, 2014. The Respondent referred the dispute to the CMA which decided the matter in his favor. The Applicant was aggrieved by the Commission award and decided to file the present application.

At the hearing of the application, the applicant was represented by Mr. George A. Shayo, Advocate, whereas the Respondent was represented by Mr. Michael Mgombozi, Personal Representative. Hearing of the application proceeded by way of written submission following the Court order.

The Applicant consolidate ground no. i and iii of the revision and argued the two grounds jointly. The Applicant Counsel submitted in respect of the consolidate ground that the Arbitrator erred not to consider his objection which was raised on 15th May, 2015 that the dispute was referred improperly before the Commission as it was based on Collective Bargaining agreement. The Respondent prayed in CMA

Form No. 1 to be paid terminal benefits as per the outcome of the Chairperson of Disciplinary Committee which was in accordance with voluntary agreement. The Respondent had no issue with the termination but he wanted his payment to be paid in accordance with Voluntary Agreement. The Commission had no jurisdiction to entertain the matter since the dispute centred on section 74(a) of the Employment and Labour Relations act, cap. 366 R.E. 2019.

It was further submitted by the Applicant that the Commission improperly interpreted the law and held that the Applicant confused between the nature of the dispute and the outcome of the dispute. The CMA was of the opinion that the nature of the dispute was indicated in the CMA Form No. 1 to be unfair termination regardless of his prayer to be paid his terminal benefits as per voluntary agreement. The Arbitrator failed to consider rule 3(5), 13(4) (a), 13(5), 16(1), (2) and (3) of the Labour Institutions (Mediation and arbitration guidelines) Rules, G.N. No. 67 of 2007 on determination of the nature of the dispute and certifying if the dispute has resolved or not.

The Counsel was of the opinion that the Commission relied on the interpretation in the book of C.K. Takwani at page 158 and the case of **Morogoro Canvas Mills (1998) Ltd vs. Mwamsumbi,**

case No. 106 of 2009, the authorities which are irrelevant to the matter at hand. The Commission interpreted the voluntary agreement provisions in reaching out to its decision which is contrary to section 74(a) and (b) of the Act as seen in page 11 of the ruling. Thus, the Commission conferred itself with illegal jurisdiction which is solely for High Court Labour Division by changing the nature of the dispute. To support the position the Applicant cited the case of **SDV TRANSAMI (T) Ltd vs. Faustine L. Mungwe, Revision No. 277 of 2016, High Court Labour Division, at Dar Es Salaam, (Unreported)**.

The Applicant Counsel submitted further that even if it is considered that the Commission had jurisdiction to entertain the dispute yet the award is illegal, irregular and does not reflect the evidence and findings of the award. The Applicant's evidence proved through Internal Investigation Report - Exhibit D1 and oral testimony of DW1 and DW3 that the Applicant attached forged taxi receipt in the imprest retirement form. The Arbitrator discredited the Applicant's evidence for the reason that there is no evidence to support the evidence that TRA was communicated and Exhibit D1 does not state where it come from and where it was addressed. But the Exhibit D1 shows in its introductory part that investigation was on claim together

with the receipt forwarded and the investigation was done by E. Amon and Gregory Ndimbo. The Arbitrator never made analysis on the balance of probability of what was stated by DW1 and DW3 and the content of Exhibit D1 in respect of the allegation that the receipt tendered by the Respondent were forged. The Arbitrator did not consider that the Respondent admitted to his misconduct by issuing a letter dated 1st August, 2014 – Exhibit D8 which was written by the Respondent as his mitigation during disciplinary hearing.

Further, the Applicant Counsel submitted that the award is contradictory, it contains irregularity and errors material to the merits of the subject matter. The Arbitrator ordered the Applicant to pay the Respondent compensation on the basis of Respondent's salary of shillings 1,950,290/=. However, the Respondent's employment contract dated 31st May, 2010 – Exhibit D2 shows that the Respondent salary was shillings 1,183,644/=. Thus, the Arbitrator used a wrong salary as basis of Respondent calculation.

Then, the Applicant Counsel submitted on the remaining ground of the revision that the Respondent was represented by Mr. Michael Mgombozi who is from Trade Union known as TUPSE which is for private security employees while the Respondent was a member of

TUICO which is the union for industrial and commercial workers. The TUICO was involved in the whole disciplinary proceedings hence could have properly guided the Respondent on this matter incliding the issue of claims for voluntary agreement. He is of the view that under rule 23(1) of the Labour Institutions (Mediation and Arbitration) Rules, G.N. No. 64 of 2007, and rule 7(a) (b) and rule 21(1) (a) (b) of G.N. No. 67 of 2007 directs openly that whenever there is need of representation then the representation may come from a member official of a party's trade union, employer's association or an Advocate. Also, section 56 (a) (b) (c) of the Labour Institution Act, Cap. 300, R.E. 2019, provides that the party can be represented by personal representative of the party's own choice. Since TUPSE was not Respondent's Trade Union it was wrong for the personal representative from TUPSE to represent the Respondent. The Applicant prayed for application be allowed, the CMA proceedings be quashed and its award be set aside.

Replying to Applicant's submission, the Respondent's Personal Representative submitted all Applicant's grounds of revision together. He argued that the Arbitrator correctly held that the Respondent was unfairly terminated from employment by the Applicant. The Applicant did not conduct the investigation per requirements of the labour laws.

The Arbitrator evaluated the evidence in record and found that Exhibit D1 which was the basis of Applicant's decision to terminate the Respondent. The evidence shows that the Respondent was terminated without being heard. To support the position the he cited the case of **BIDCO Oil and Soap Ltd vs. Robert Matonya and 2 Others, Revision No. 786 of 2018, High Court Labour Division, at Dar Es Salaam, (Unreported).**

The Respondent averred that the Respondent letter – Exhibit D8 was to accept termination. The letter was wrote after he was terminated. This does not mean that the Respondent was admitting to commit the alleged offence as it was alleged by the Applicant. The argument by the Applicant is the new one which was not argued before the Commission, it is raised for the first time before this Court hence the same has to be disregarded.

The Respondent's Representative submitted regarding the salary which is the basis of the Commission award that the Respondent tendered his salary slip- Exhibit FM3 which shows that his salary was shillings 1,950,290/= per month. Also, the Commission has power to order other terminal benefits together with compensation for unfair termination which is provided under section 40 (1) of the Employment

and Labour Relations Act. The respective terminal benefits are provided under section 44(1) of the Employment and Labour Relations Act, Cap. 366, R.E. 2019 and includes any remuneration for the work done, annual leave pay, accrued annual leave, notice pay, severance pay and transport allowance if any. Thus, the Commission award was justified and was in accordance with the law. The Representative cited in support of the position the case of **Access Bank Tanzania Limited vs. Raphael Dismas, Revision No. 39 of 2015, High Court Labour Revision, at Dar Es Salaam, (Unreported).**

Regarding the Applicant's submission that the Respondent was improperly represented by Mr. Michael Mgombozi TUPSE which is for private security employees while the Respondent was a member of TUICO which is the union for industrial and commercial workers that, the Respondent's Representative submitted that the dispute at hand is between the employer and the Respondent. It was not filed by TUICO. TUPSE was not party to the dispute. The Respondent has right to choose who can represent him in this dispute. To support the position he cited the case of **Eva Dominick Kamote vs. Wanyama Hotel Co. Ltd, Revision No. 687 of 2018, High Court Labour Division, at Dar Es Salaam, (Unreported).**

The Respondent the prayed for the application be dismissed and the CMA award be upheld.

In rejoinder, the Applicant retaliated his submission in chief and emphasized that the Respondent's Representative is admitting at page 2 of the submission that since it was the first misconduct by the Respondent he was not supposed to be terminated. But, the law is clear that there are situation which allows the employer to terminate employee who commits the misconduct for the first time. The issue raised by the Respondent that he was condemned unheard is new and was never raised before the Commission hence this Court has to disregard it the same to the issue that the Respondent was forced to accept termination. The Salary slip tendered by the Respondent as Exhibit C1 was heavily cross examined hence it is worthless.

From the submissions, there are five issues for determination. The issues are as follows; -

i) Whether the Commission had jurisdiction to entertain the matter.

ii) Whether the award was properly procured by the arbitrator at CMA.

iii) Whether the reason for termination was valid and fair.

iv) Whether the procedure for termination was fair.

v) What are the reliefs entitled to parties?

Commencing with determination of the first issue about the jurisdiction of the Commission to entertain the dispute, the Applicant submitted at lengthy that the dispute before the Commission was about the interpretation of the Collective Bargaining Agreement which its jurisdiction is vested to the High Court Labour Division under section 74 of the Employment and Labour Relations Act, Cap. 366, R.E. 2019. Thus, the Commission erred to hold that it has jurisdiction to determine the matter. The Respondent was of the opinion that the Commission rightly held that it has jurisdiction to entertain the matter since the CMA Form No. 1 shows that the nature of the dispute was unfair termination of the Respondent's employment.

I have read the respective CMA Form No.1 the document which instituted the dispute before the Commission. The CMA Form No. 1 shows that the nature of dispute is termination of employment. The form further shows that the outcome of the mediation is payment of Respondent's terminal benefits as per outcome of the Chairman of Disciplinary Hearing Committee. The Respondent filled in the part B of the CMA Form No. 1 which is additional form for termination of

employment dispute only. The additional form shows that the Respondent started to work to his employer on 12th May, 2008 and was terminated for misconduct on 20th August, 2014. The form further shows that the Respondent feels that the termination was procedurally unfair because he was not given an opportunity to cross examine employer's witnesses and the employer failed to call witness to prove his case before the Disciplinary Committee. Also the Respondent also feels that the reason for termination was unfair because there is no evidence to prove the alleged reasons for termination. This evidence proves that the dispute before the Commission was about fairness of termination of employment.

The Applicant was of the opinion that since the Respondent claim to be paid terminal benefits as per decision of the Disciplinary Committee which shows that the Committee outcome of the hearing recommended that the Respondent to be terminated with pay according to Collective Bargaining Agreement (CBA). This Applicant's submission is misconceived for the reason that the claims for payment of terminal benefits was outcome of the respective dispute and not the nature of the dispute. The Respondent did not file at all the dispute regarding interpretation of Collective Bargaining Agreement. Thus, the

Commission was justified to hold that it has jurisdiction to entertain the matter. Therefore, I find the first issue is positive that the Commission had jurisdiction to entertain the matter.

The second issue is whether the award was properly procured by the arbitrator at CMA. The Applicant argued that award does not reflect the evidence and findings of the Commission as the Arbitrator exhibited biasness by holding that there was no proof that there was communication with TRA in total disregarding to the Applicant's evidences. The Applicant alleged that the Respondent was represented by Personal Representative from TUPSE which is Trade Union representing employees from private security while the Respondent was member of TUICO which is Trade Union for Industrial and Commercial Workers. The Respondent was of the opinion that the Commission award reflects the evidence and findings of the Commission. The Respondent submitted regarding the issue of Personal Representative that the dispute at hand is between the employer and the Respondent. It was not filed by TUICO. TUPSE was not party to the dispute. The Respondent has right to choose who can represent him in this dispute.

The Labour institutions Act, Cap. 300, R.E. 2019, provides in section 56 (a) (b) and (b) that a party to the proceedings may appear in person or be represented by an official of a registered trade union or employer's organization, **a personal representative of the party's own choice** or an advocate. But, this is in regards to the discretion of party to the proceedings before the Labour Court to be represented by any representative of his own choice.

The provision of the Law which provides for representation before the Commission for Mediation and Arbitration is Section 86(6) and Section 88(7) of the Employment and Labour Relations Act, Cap. 366 R.E. 2019. These Sections which were amended by Written Laws (Miscellaneous Amendments) Act, Act No. 8 of 2006 provides clearly that a party to Mediation or Arbitration proceedings may be represented by a member or official of that party's trade union or employer's association or an advocate or a personal representative of party own choice. Despite the facts that rule 23(1) of the Labour Institutions (Mediation and Arbitration) Rules, G.N. No. 64 of 2007, and rule 7(a) (b) and rule 21(1) (a) (b) of G.N. No. 67 of 2007 provides that whenever there is need of representation then the representation may come from a member official of a party's trade union, employer's

association or an Advocate. But, since the Employment and Labour Relations Act, Cap. 366, R.E 2019 provides clearly that personal representatives of party's own choice are allowed to represent them before the Commission, the party to the dispute before the Commission may be represented by personal representative of their own choice. Thus, the allegation that the Respondent was not supposed to be represented by personal representative from different trade union has no basis.

Furthermore, the issue of personal representative was not raised before the Commission. It is raised for the first time in this revision which means that it is an afterthought. The party, especially the Respondent, had no opportunity to address the matter before the Commission for the Court to be able determine it. Thus I find that the issue is new and has been raised for the first time before the Court.

Looking at the Commission award it is very clear that it contains the details of the parties, issues in dispute, history background, summary of evidence and argument, reasons for the decision and the precise order as provided under rule 27(3) of the G.N. No. 67 of 2007. The allegation that the Arbitrator was biased by disregarding Applicant's Witnesses oral testimony has no basis since the testimony

of DW1 and DW3 concerning the TRA report about the alleged motor vehicle registration number found in the taxi receipt attached with the retirement imprest was challenged by the Respondent. Thus, the same requires another evidence to support it. However, there is no TRA report which was tendered. Also, it was not clear as to whom the investigation report was addressed to. Hence, there is no biasness at Arbitrators' decision. Thus, I find that the Commission award was properly procured hence the answer to the second issue is positive.

Turning to the 3rd issue whether the reason for termination was valid and fair, the Employment and Labour Relation Act, Cap. 366, R.E. 2007,provides in section 37(2) (a) and (b) that a termination of employment by an employer is unfair if the employer fails to prove that the reason for termination is valid and fair. Onus of proof for fairness of termination is on the employer as per Section 39 of Cap. 366 and the proof is on a balance of probabilities.

It is in record that the Respondent was charged for the disciplinary of offence of cheating on claiming expenses for taxi from the factory to port, forging of documents for his own benefit. The hearing form – Exhibit D6 shows the evidence presented before the Disciplinary Committee was investigation report, Respondent's

statement, receipts and witness statements. I have read the investigation report, witness statement of Abdallah Hamisi and Respondent statement. It is clear that there is no evidence to prove what has been alleged in the investigation report. There is no proof of forgery of the taxi receipt. Abdallah Hamisi statement shows that he gave the Respondent taxi receipts worth in total shillings 600,000/=. This means that if these receipt were forged it was the witness who forged it. Concerning the remaining taxi receipts the Respondent denied in his statement to forge the receipt. The investigation report was not supported by evidence from TRA to prove that the alleged taxi registration numbers in the receipts some were for trucks, motorcycles, tricycles and SUV's. Thus, I find that there was no sufficient evidence to prove the reason for termination as it was held by the Commission.

The 4th issue is whether the procedure for termination was fair. Section 37(2) (c) of the Employment and Labour Relation Act, provides that a termination of employment by an employer is unfair if the employer fails to prove that the employment was terminated in accordance with a fair procedure. The fair procedure for termination for misconduct is provided under rule 13 of the Employment and Labour Relations (Code of Good Practice) Rules, G.N. No. 42 of 2007.

It is in record that the Applicant followed some of the procedures in terminating the Respondent for misconduct. The Applicant informed the Respondent about the misconduct as shown by Exhibit D3, Investigation was conducted and the report was made as shown by Exhibit D1, the respondent was notified of disciplinary hearing as per Exhibit D6 and disciplinary hearing was conducted as shown by hearing form – Exhibit D7. Then, the Applicant was notified of the outcome of the disciplinary hearing as per Exhibit D12 and he was notified of the terminated as per Exhibit D13.

However, the evidence available shows that the Respondent was not given the respective investigation report which was the basis of the disciplinary charges. Failure to accord the employee with the report which is the basis of allegation amount to deny the employee right to be heard. This position was taken by the Court of Appeal in the case of **Severo Mutegeki and Another vs. Mamlaka ya Maji Safi na Usafi wa Mazingira Mjini Dodoma (DUWASA),** Civil Appeal No. 343 of 2019, Court of Appeal of Tanzania at Dodoma, (unreported).

Further, the Respondent alleged that he was denied right to hear witnesses and to cross examine them during disciplinary hearing. The Hearing Form – Exhibit D9 shows that the evidence which was relied

by the Disciplinary Committee in reaching decision was investigation report, Respondent's statement, receipts and witness statement. This prove that employer's witnesses were not called to the disciplinary hearing. Also, the hearing form does not show if the Respondent was given an opportunity to call his witnesses. This is contrary to rule 13 (5) of G.N. No. 42 of 2007.

The Applicant alleged that the Respondent did write a letter – Exhibit D8 where he admitted to commit the offence. However, reading the respective Exhibit D8 it is clear that the Respondent was mitigating after he was found guilty by Disciplinary Committee. This could not be said to be admission since the Respondent was pleading to Disciplinary Committee to reduce the punishment after finding him guilty for misconduct. Therefore, I find that the procedure for termination was unfair.

The last issue is what reliefs are entitled to the Respondent. The Arbitrator did find that the Respondent is entitled to 12 months' salary compensation for unfair termination, remuneration for the work done, annual leave pay, notice pay and severance pay. The basis for the calculation was shillings 1,950,000/=. The Applicant was of the opinion that the Respondent salary is shillings 1,183,644/= according to the

employment contract dated 31st May, 2010 – Exhibit D2. However, as submitted by the Respondent, the CMA typed proceedings shows in page 58 that the Respondent tendered his salary slip which was not objected and it was received as Exhibit C1. The Exhibit C1 shows that the Respondent salary was shillings 1,950,000/= as it was held by the Commission. Thus, the Commission rightly calculated the Respondent entitlement on the salary. There is no doubt that the Commission arbitral award was justified and I find no reason to revise it. The Commission rightly held that the Applicant has to pay the Respondent a sum of shillings 31,804,726/= being 12 months' salary compensation for unfair termination, notice pay, remuneration for the work done, annual leave pay and severance pay.

Therefore, I find that the Revision Application is devoid of merits and I hereby dismiss it. The CMA award is upheld. Each party to take care of his own cost of the suit.

A.E MWIPOPO
JUDGE
23/04/2021