IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 185 OF 2023

(Original from the Award in Labour Dispute No. CMA/DSM/TEM/207/2022/128/2022)

ZAMBIA CARGO & LOGISTICS LIMITED.....APPLICANT

VERSUS

ALLY SAID AMANZI.....RESPONDENT

JUDGEMENT

Date of last order:- 01st November 2023

Date of judgement:-14 Nov. 2023.

OPIYO, J

The Applicants herein namely **ZAMBIA CARGO & LOGISTICS LIMITED** has filed the present application against the decision of the Commission for Mediation and Arbitration (CMA) in Labour dispute No. CMA/DSM/TEM/207/2022/128/2022 dated 21st July 2023 by Hon. Nyang'uye, Arbitrator praying for the orders of the Court revise the whole of the proceedings and award of the Commission for Mediation and Arbitration.

The application is supported by the affidavit of Ignatus Fabian applicant's Principal Officer. Paragraph of the Affidavit contains one major legal issue arising from material facts, that, the trial arbitrator arbitrarily/unjustly and unlawful exercised her discretion in in awarding the respondent payment of 12 months salaries as compensation for unlawful termination despite overwhelming evidence adduced in contrast.

The background of the dispute in brief is that; the respondent was employed as Container Clerk by the applicant for permanent employment contract. Subsequently, he was promoted to be in a position of Yard supervisor handling invoice advice. He was terminated on 20th May 2022 for the reason of misconduct (gross negligence, contravention of Company Policy by guaranteeing a client to pay dept. and contravention of employer Policy which require employee to show reasonable care). Dissatisfied with the termination, respondent filed the matter at CMA. The Commission determined the matter on his favor by awarding him 12 months compensation to the tune of TZS 9,420,000/= for unfair termination. Aggrieved by the award, applicant filed the present application.

Both parties to the application were represented. The Applicants were represented by Ms. Erene Mchau and Mr. Ndehorio Ndesamburo, learned counsels, whereas the Respondent was represented by Ms. Suzan Mwansele, Advocate. The Court ordered for the hearing of the matter to proceed by way of written submissions following the parties' prayer.

In support of the application, the applicant's Counsels submitted that, the payment of compensation to the employee is based on the discretion of the court that must be exercised justly depending on the facts of the case. They stated that there are circumstances upon which such decision may be interfered by superior court when realization that the discretion was exercised illegally and unjustly as was addressed in the case of **Veneranda Maro and Another Vs. AICC,** Civil Appeal No. 322 of 2020 Court of Appeal of Tanzania at Page 12 which highlighted the circumstances where the superior Court can interfere with the discretion exercised by Lower court. They argued that, this decision is relevant to this matter, as the trial arbitrator unlawfully and unjustly exercised her discretion in awarding the respondent the payment of 12 months as compensation despite of overwhelming evidence that was tendered before CMA in opposition.

Ms. Mchau averred that, the respondent admitted the offences he was charged with during disciplinary hearing, as per Exhibit D7 (Disciplinary hearing form) at page 2. Also, in Exhibit D5, the letter the respondent wrote to the Human Resource Manager at Paragraph 4, 5 and 6 the respondent admitted that he released the container without full payment and approval of supervisor and he even apologized knowing what he did was against the rules of the company.

They added that, in the award, it is clearly appreciated that the respondent committed an offence at Page 8. Also, page 10, first paragraph it was stated that it is the respondent who released the container without payment. She stated that reading the award at Page 3 paragraph 2 it is shown that applicant explained to the CMA that the customer 'last invoice' was made to pay 20ft container instead of 40ft container and the respondent as a yard supervisor is the one who prepared invoice advice and submitted the same to the accounts department, the facts that were admitted by the respondent in wholesome. They drew attention of this court to the case of **Nickson Alex v Plan International,** Rev. NO. 22 of 2014, in which what has to

be done in case one admits wrongdoing was explained. For that reason they argue that there was a fair reason for termination.

The counsels continued to submit that, the applicant was properly charged in prosecuting this matter by maintaining fair procedure. He was legally charged as per the charge sheet, exhibit D6. He was charged for not obeying the rules of the company, clause 8 of exhibit D2 (Code of Ethics and Conduct). He was also given fair hearing as per exhibit D7 (Hearing Form). He was as well given chance to call his representative one Stephen Maguso. According to them all the Procedures were well followed despite the allegation in counter affidavit that he was denied a right to be heard, calling a witness and mitigating. He was well availed with all the chances, they submitted.

In the alternative, even if it is found that there were some procedural lapses, there are a number of decisions which settled a legal principle that when there is substantive reason, but with procedural lapses will attract lesser penalty. The holdings in the case of **Veneranda Maro (Supra)**, also the case of **Felician Rutwaza Vs. World Vision Tanzania**, Civil Appeal No. 213/2019 were made reference to.

Lastly, the counsels contended that, both oral and documentary evidence proved that the termination was both substantive and procedural fair. They prayed that the court adopt the reasoning in the above grounds in answering this ground to avoid repetition. The final prayer is for the application to be granted and court to proceed to quash and set aside the CMA award.

In reply, to the application regarding compensation of 12 months, Ms. Mwansele submitted that the discretion was exercised lawfully and justly. She stated that, the arbitrator ordered a minimal compensation by awarding 12 months as per Section 40 of ELRA. On that basis, she believes that the award was just because the termination was unfair both substantively and procedurally.

In line with exhibit D7 (hearing form) she stated that, the said form does not contain offences the respondent was charged with. That, reading the charge sheet, the offences were gross negligence, guaranteeing clients payments against company policy. The same offences are seen in the termination letter. But in hearing, the proceedings reflect only one offence for the applicant to defend himself against. This resulted to the committee deciding on new offences the respondent was not charged with as per paragraph 2 of Exhibit D7 they

talked of breach of trust and corruption and fraud. According to her, these offences were new with strange facts different from those he was charged with in the charge sheet.

Regarding admission of offence, Ms. Mwansele submitted that, this is wrong because the letter the respondent wrote to the Human Resource Manager (Exhibit D5) did not amount to admission of the offence; rather, he just apologized if there was any mistake. She further added that, the respondent was not working alone in that office and his role was only to check if the container was fully paid for or not. That, he took time to notify his supervisor regarding the size of the container as he was acting in the best interest of the company.

On previous records, Ms. Mwansele submitted that, it was the first offence for the respondent; he wonders how it led to termination. She contended that, the procedure of termination is a creature of statute; therefore, they ought to adhere to procedures provided by the law in terminating employee. She further added that, there was no proof if they concluded investigation contrary to rule 13(1) of GN 42 of 2007, they had to investigate before hearing to see if there is a reason of proceeding with the hearing. She said that, since the client paid the next

day in the morning, it means there was no loss to the company caused by the respondents act.

Lastly, the counsel submitted that, the proceeding is silent as to whether respondent's statements were included. She added that, no extract is showing what he said. All these bringing disciplinary proceedings into question. According to her, the respondent's right to be heard was violated as he was convicted on the offences charged without being given a chance to be heard. She thus prayed for the application to be dismissed.

In rejoinder, Ms. Mchau submitted that, in relation to admission of offence, by reading hearing form at Page 2, it is on record that the respondent admitted offences he was charged with. In the circumstances, there was no any further proceeding after he admitted the offence. She stated that, the need for cross examination, mitigation etc. do not arise in the scenario of this case after admission of the offence, and there was no need of calling further witnesses.

Further, she submitted that, they did not conduct investigation to prove that company did not suffer loss as it was paid the next day. According to her, there are circumstances that the investigation can be done and

sometimes not. That, provided that respondent breached the rules by releasing the container without payment, the other stories are irrelevant.

Regarding charge sheet, Ms. Mchau submitted that, what appears in hearing form, charge sheet (exhibit D6) and hearing form (exhibit D7) are the same save for difference in language. Therefore, the argument that the offences charged and those tried for are different is unfounded.

On exhibit D5, the letter the respondent wrote to the Human Resource, she submitted that, the said letter has to be read as a whole to understand it instead of being read in part only. That, according to it, the applicant obviously admitted the offence.

Having cautiously gone through the CMA records and submissions of the parties this Court finds that the issues for determination is whether respondent's termination was both substantively and procedurally unfair. At CMA the arbitrator found that, the applicant had no valid reason for termination, on the reason that the offence of disobeying lawful order does not fall under the ambit of negligence.

In approaching the above issue, four grounds identified in the affidavit will be considered jointly in addressing two aspects of termination as

contested by the parties. I find wise to start with the first aspect regarding reason for termination. The applicant contended that the arbitrator erred in law in his findings by holding that there was no valid reason for termination despite of his own admission of the offence. On that basis, her counsel was of the view that, the evidence was not properly evaluated.

Resisting side maintained that the applicant failed to prove the offence against the respondent. As he was charged with a different offence contrary to what was proved before disciplinary committee. She further added that the respondent never admitted the offence rather than an apology for the mistake.

Answering this question entail discussing aspects relating to substantive fairness. The Employment and Labour Relations Act, Cap 366 R.E 2019 under Section 37, it is provided that, it is unlawful for the employer to terminate the employment of an employee unfairly. It put the duty of proving fairness and validity of the reason for termination to the employer.

In this application, it is undisputed that, 40ft containers were released for the payment of 20ft containers. That means, there was half payment

resulting from poor preparation of invoice advice by the respondent. It is also undisputed that, the one who was entrusted with a duty of preparing Invoice Advice was the respondent. At the time the event took place the respondent was in a position of Yard Supervisor foreseeing preparation of the said invoice advice. Being entrusted with such role, I am of the view that, applicant could not escape the liability of monitoring the release of those containers.

I have also gone through Exhibit D-2 (code of ethics and conduct) under clause 8, it directs employees to be accountable. Again Rule 12(4) of the G.N No. 42 of 2007 provides that

> *"in determining whether or not termination is the appropriate sanction, the employer should consider*
>
> a) *-the seriousness of the misconduct in the right of the nature of the job and the circumstances in which it occurred, health and safety, and the likelihood of repetition; or*
> b) *the circumstance of the employee such as the employee's employment record, length of service, previously disciplinary record and personal circumstances."*

From the above rules, in relation to seriousness of the misconduct, indeed, preparation of the wrong invoice advice was so serious as it led to the less and misleading payment to the applicant. It depicts high level

of negligence. Although, the circumstances of the employee is that the respondent had no bad record including previously warning, but being associated with such a serious misconduct is enough to subject him to equally serious disciplinary consequences. What he did was specifically prohibited under the employer's policy.

Although he defended himself that he took steps of guaranteeing the client with the condition of paying himself if the customer failed to do so and that just the next day from when containers were released the client paid the remained amount as per Exhibit D11, thus applicant suffered no loss. All these defences were irrelevant, in my view, as the act resulted to undercharging contrary to employer's policy. In my considered view, in such circumstances, termination was a proper sanction as the offence of releasing container without full payment was well proved.

Regarding allegation that there was a variation of offences, I had ample time to go through exhibits, including Exhibit D7 (disciplinary form), I noted that respondent admitted one offence that he guaranteed a client to release the containers without paying full amount, as justified at page 2 paragraph 9 (i). Since the admission of the offence suffice to convict

the respondent, then respondent allegation regarding other offences stipulated in exhibit D6 (charge sheet) and exhibit D4 (notice of appearance) lacks merits on the reason that, such minor discrepancy does not take away the reality that the applicant was found guilty of the offence on his own admission. Further to that, Exhibit D9 (termination letter) under Item 2 contains the offence admitted by the applicant during disciplinary hearing. On such legal findings, I am of the view that, applicant's allegation of being charged with other offences could have legal merits if he was found guilty of those other offences contrary to what he pleaded at disciplinary hearing.

Regarding the procedural aspects, the applicant challenged arbitral award by insisting that all procedures were adhered to basing on nature of this matter, while the respondent contested that, there was no fair hearing as the respondent was terminated for the offence not charged with. He further challenged the issue of investigation that it was not initiated to establish the need of conducting disciplinary hearing. As discussed herein above, in relation to exhibit D4 (notice of appearance) under Item 2 also contains the offence for which the respondent was charged with. That means, he knew the offence before the hearing. Further to that, notice for appearance was issued on 28th April 2022 and

the hearing was conducted on 02nd May 2022. What that means is that the respondent was afforded with a time of preparing for hearing. All these justifies that applicant complied with the procedures as per Rule 13(2) and (3) of the Employment and Labour Relations (Code of Good Practices) G.N No. 42 of 2007.

Regarding investigation report, I am aware of Rule 13(1) regarding the essence of conducting investigation. It is to ascertain whether there are grounds for disciplinary hearing to be initiated. However, things are different in this matter as there was no need of investigation since it was undisputed that there was undercharging in releasing the alleged containers. This is even proved by the fact that final payment for unpaid containers was made on the next day after release of the containers as per Exhibit D11 (final payment), the fact which automatically attract disciplinary action. Thus the procedure was generally adhered to. The essence of not applying procedure in checklist fashion has been addressed in the case of **Justa Kyaruzi V NBC Ltd,** Revision No. 79 of 2009, Lab Division at Mwanza, it was held that:-

> *"What is important is not application of the code in the checklist fashion, rather to ensure the process used adhere to the basics of fair hearing in the labour context depending on the circumstances*

of the parties, so as to ensure the act to terminate is not reached arbitrarily. Admittedly, the procedure may be dispensed with as per Rule 13(12) of the Code."

The above authority sketches a demarcation for those matters which require investigation and those which cannot fall under such category of being investigated. Having seeing that, I agree with applicants counsel that basing on the nature of this matter, there was no need of conducting investigation. I therefore in the upshot reach a finding that the applicant managed to adduce grounds of quashing and setting aside the CMA award.

For the reasons, the CMA award is hereby quashed and set aside as the respondent was both substantively and procedurally fairly terminated.

Application allowed.

M. P. OPIYO

JUDGE

14/11/2023