IN THE HIGH COURT OF TANZANIA
LABOUR DIVISION
AT DAR ES SALAAM

REVISION APPLICATION NO. 6050 OF 2024

(Arising from Award issued on 24/8/2023 by Hon. Massawe, Y., Arbitrator, in Labour Dispute No. CMA/DSM/KIN/343/19/2022 at Kinondoni)

SAUDA KIWANDA..... APPLICANT

VERSUS

DAWASA(MAMLAKA YA MAJI SAFI

NA MAZINGIRA DAR ES SALAAM)..... RESPONDENT

JUDGEMENT

Date of Last Order: 15/04/2024
Date of Judgement: 13/05/2024

B.E.K. Mganga, J.

On 16th November 1984 applicant secured employment as secretary from DAWASCO which later changed the name into DAWASA, the herein respondent. On 30th November, 2008, DAWASCO terminated employment of the applicant allegedly that, applicant embezzled TZS 1, 400,000/= by recharging mobile phones of persons not in the list. Applicant was aggrieved with the said termination as a result, she filed Labour complaint No. CMA/DSM/KIN/343/19/2022 before the

Commission for Mediation and Arbitration at Kinondoni complaining that she was unfairly terminated.

On 24th August 2023, Hon. Massawe, Y, arbitrator, having heard evidence of the parties issued an award in favour of the respondent that termination was both substantively and procedurally fair. Further aggrived, applicant filed this application seek the court to revise the said award. In the affidavit in support of the application, applicant raised two grounds namely:-

1. *That the Commission for Mediation and Arbitration errred in law and facts by disregarding facts if otherwise considered he would have reached in fair, rational and just decision.*
2. *That the decision of the Commission for Mediation and Arbitration condoned the illegality committed by the respondent during disciplinary hearing process ands failed to evaluate evidence thus arriving at a wrong conclusion as regard to procedural irregularities.*

On the other hand, respondent opposed the application by filing both the Notice of Opposition and the Counter affidavit sworn by Florence Saivoiye Yamat, her principal officer.

When the application was called on for hearing, Mr. Raymond Wawa, learned advocate appeared and argued for and on behalf of the applicant while Mr. Amos Enock, learned State Attorney appeared and argued for and on behalf of the respondent.

Arguing the two grounds jointly in support of the application, Mr. Wawa submitted that, reasons for termination were unfair and that, respondent did not follow fair procedures of termination. Learned counsel submitted that, respondent was supposed to prove the allegation of emblezlement beyond reasonable doubt considering the nature of the allegation. He cited section 28 of the Prevention and Combating Corruption Act that defines embezzlement because the term embelzelement is not defined in labour laws. He submitted further that, the said section requires proof of this offence to be beyond reasonable doubt hence respondent was supposed to prove the case beyond reasonable doubt. When probed by the court, he conceded that, the matter that was before the arbitrator was a labour complaint and not a criminal offence. He was however quick to submit that, though it was a civil nature touching allegations of criminality, respondent was supposed to prove beyond reasonable doubt. Mr. Wawa further submitted that, in exhibit D2, respondent required applicant to explain as to why she recharged mobile phone vouchers to persons not entitled. He went on that, the notice to attend disciplinary hearing (exhibit D4)also relates to embezzlement. He maintained that, respondent did not prove the allegation of embezzlement hence there was no valid reason for termination. He added that, it was alleged that applicant admitted to

have committed the alleged misconduct based on exhibit D2 but, in fact, she did not, because, in the said exhibit, applicant explained what happened.

On procedural fairness, learned counsel for the applicant submitted that, investigation was not conducted though respondent tendered audit report (exhibit D1) to show that it was conducted hence termination was unfair procedurally. Learned counsel submitted further that, respondent did not call persons who she alleged applicant recharged their mobile phone. He went on that, even the service provider, namely vodacom, was not called as a witness. He went on that, the chairperson did not report the outcome of the disciplinary hearing as per Rule 13 of the Employment and Labour Relations(Code of Good Practice) Rules, GN. No. 42 of 2007. He added that, respondent made a decision based on the report by HR officer and not the disciplinary hearing committee because, the chairperson of the disciplinary hearing committee did not issue a report. In his submissions, learned counsel for the applicant conceded that, in CMA F1, applicant did not complain that she was not issued with the hearing report or that respondent's decision was based on HR report. He conceded that, neither the parties nor the arbitrators can depart from their own pleadings. Learned counsel for the applicant

concluded that, termination was unfair procedurally and prayed that the application be allowed by quashing and setting aside the award.

Arguing the 1st ground of the application, Mr. Enock, learned counsel for the respondent submitted that, section 60(2)(b) of the Labour Institutions Act [Cap.300 R.E 2019] provides that proof is on balance of probabilities and not beyond reasonable doubt. He added that, respondent proved the allegation against the applicant because, in exhibit D2, applicant admitted the allegation. He submitted further that, in the disciplinary hearing (exhibit D5), applicant admitted to have committed the misconduct. He went on that, according to Rule 13(11) of GN. No. 42 of 2007, when the employee admits the misconduct, the employer can terminate employment without adhering to procedures. To support his submissions, learned State Attorney cited the case of ***Nickson Alex v. Plan International***, Revision No. 22 of 2014, HC(unreported) and ***Mantra Tanzania Limited v. Daniel Kisoka***, Revision Application No. 267 of 2019, HC(Unreported). There was valid reason because even applicant admitted in her letter to show cause.

Learned State Attorney submitted further that, respondent complied with procedural termination provided under Rule 13 of GN. 42 of 2007. He added that, appplicant was given right of hearing and she was represented at the disciplinary hearing.

On the relief of reinstatement, learned Stated Attorney submitted that, applicant has attained the compulsory retirement age and now she is 62 years old hence she cannot be reinstated. He concluded by praying the court to confirm CMA award.

In rejoinder submissions, Mr. Wawa, learned counsel for the applicant maintained that proof in labour matters is not always on balance of probabilities. He added that, when the dispute relates to criminalities, standard of proof is beyond reasonable doubt. He further submitted that, it is not true that applicant admitted to have committed the alleged misconduct. He also submitted that Rule 13 (11) of GN. No. 42 of 2007 is an exception in special circumstances and that, respondent did not give evidence relating to those circumstances hence the said rule is inapplicable. He further submitted that, Audit report is not an investigation report. He concluded that there was no valid reason and that procedures were not adhered to.

I have examined evidence of the parties in the CMA record and considered their submissions in this application and find that, issues are whether termination was fair substantively and procedurally and the reliefs the parties are entitled to.

It was testified by Lilian Lucas(DW1) that applicant was charged with the misconduct that she recharged mobile vouchers to unauthorized

phone numbers hence occassioning loss of TZS 1,400,000/= to the respondent. This is also reflected in the charge(exhibit D2). The said charge was a result of the internal audit report(exhibit D1). According to evidence of DW1, applicant admitted in her letter (exhibit D3) when she was asked to explain as to why disciplinary measures should not be taken against her. Based on the foregoing, applicant was terminnated on 30th November 2008 as per termination letter(exhibit D6). In fact, in her evidence, Sauda Kiwanda(PW1) admitted in her evidence when under cross examination that she re-charged mobile phones that were not in the list of numbers to be recharged. Some of the mobile phone numbers she admitted to have recharged while they were not in the list are 0753 791623, 0753 791647, 0753 791648, and that some of the mobile phones that were on the list such as 0762 748319 and 0753 791674 were nor recharged for four months. It is my view that respondent had a valid reason hence termination was fair substantively.

It was submitted on behalf of the applicant that, respondent did not prove the allegation beyond reasonable doubt reliance being section 28 of the Prevention and Combating Corruption Act. With due respect to learned counsel for the applicant; that section does not apply to the application at hand because this is a labour complaint and not a criminal charge. It was correctly submitted by the learned State Attorney that

standard of proof in labour cases is at the balance of probabilities. I agree with counsel for the applicant that, when the alleged misconduct has criminal element, respondent is supposed to prove the charge to the standard higher than balance of probability but that standard is not beyond reasonable doubt. See the case of ***Bilali Ally Kinguti vs Ahadi Lulela Said & Others*** (Civil Appeal No.500 of 2021) [2023] TZCA 17337 (13 June 2023), ***Abraham Sykes vs Araf Ally Kleist Sykes*** (Civil Appeal No. 226 of 2022) [2024] TZCA 20 (7 February 2024) and ***City Coffee Ltd vs Registered Trustee of Ilolo Coffee Group*** (Civil Appeal No. 94 of 2018) [2019] TZCA 645 (1 November 2019). In ***City Coffee's case***(supra), the Court of Appeal quoted the decision in the case of ***Ratilal Gordhanbhai Patel v. Lalji Makanji*** [1957] E.A 314 wherein it was held at page 316 that:-

> *"Allegations of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required."*

The Court of Appeal further quoted its decision in the case of ***Omari Yusuph v. Rahma Ahmed Abdulkadr*** [1987] TLR 169, at 174 as follows:-

> *"... it is now established that when the question whether someone has committed a crime is raised in civil proceedings that allegation need be established on a higher degree of probability than that which is required in ordinary civil cases... the logic and rationality of that rule being that the*

stigma that attaches to an affirmative finding of fraud justifies the imposition of a strict standard of proof…"

Having quoted the above cited cases, in ***City Coffee' case*** (supra), the Court of Appeal concluded:-

"In view of the foregoing, it is clear that regarding allegations of fraud in civil cases, the particulars of fraud, being a very serious allegation, must be specifically pleaded and the burden of proof thereof, although not that which is required in criminal cases; of proving a case beyond reasonable doubt, it is heavier than a balance of probabilities generally applied in civil cases."

I therefore hold that, respondent was not required to prove the allegations beyond reasonable doubt.

I have pointed hereinabove that, in the reply to show cause(exhibit D3) and in her evidence, applicant(PW1) admitted to have committed the misconduct. Evidence of the applicant taken together with that of the respondent proved the misconduct to the required standard explained hereinabove. In fact, there is no good witness than the one who admits the offence or the misconduct charged with. Admission of the applicant both in her letter(exhibit D6) and in her evidence was a sufficient proof hence termination was fair substantively.

It was submitted by counsel for the applicant that, applicant was not served with the investigation report. With due respect to counsel for

the applicant, this was not amongst the complaint in the CMA F1. It was correctly conceded by counsel for the applicant that parties are bound by their own pleadings and they are not supposed to depart therefrom as it was held in the case of ***Ernest Sebastian Mbele vs Sebastian Mbele & Others*** (Civil Appeal 66 of 2019) [2021] TZCA 168 (4 May 2021), ***Salim Said Mtomekela vs Mohamed Abdallah Mohamed*** (Civil Appeal No. 149 of 2019) [2023] TZCA 15 (15 February 2023), and ***Registered Trustees of Islamic Propagation Center (ipc) vs The Registered Islamic Center (tic) of Thaaqib Trustees*** (Civil Appeal 2 of 2020) [2021] TZCA 342 (27 July 2021).

In the ***IPC's case*** supra, the Court of Appeal held inter-alia that:-

> *"As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings ... For the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation."*

In ***IPC's case*** (supra), the Court of Appeal further held that:-

"Any evidence produced by any of the parties which does not support the pleaded facts or is at variance with the pleaded facts must be ignored."

What was pleaded by the applicant in CMA F1 in relation to procedural fairness is that (i) minutes of the disciplinary hearing did not reflect what transpired in the disciplinary hearing, (ii) respondent used regulations that was not approved by the board, (iii) respondent violated section 6 of the Employment and Labour Relations[Cap. 366] and Rules 31 and 32 both of the Employment and Labour relations(Code of Good Practice) Rules , GN. No. 42 of 2007, (iv) DAWASCO is not her employer and (v) there was discrimination. I have examined evidence adduced by the applicant and find that she said nothing relating to any of these complaint.

I have read Rule 31 of GN. No. 42 of 2007 and find that it relates to discrimination but no evidence was led by the applicant as to how she was discriminated. On the other hand, Rule 32 of GN. No. 42 of 2007(supra) requires the employer to give employees equal opportunity. Again, no evidence was adduced by the applicant as to how she was denied equal opportunity. In CMA F1, applicant complained that there was violation of section 6 of Cap. 366 R.E. 2019(supra). I have read the

said section and find that it prohibits forced labour in our country. There is no scintila of evidence that there was forced labour against the applicant. It is my view that, it was not enough for the applicant just to allege in her pleading(CMA F1) without supporting her pleadings or allegations with evidence. I am not saying that applicant had a duty to prove because that duty is of the employer. What is clear is that, applicant was supposed to adduce evidence relating to what she was complaining about to justify the arbitrator to issue the award in her favour but she did not.

It was submitted on behalf of the applicant that, the chairperson did not report the outcome of the disciplinary hearing as per Rule 13 of the Employment and Labour Relations(Code of Good Practice) Rules, GN. No. 42 of 2007 and that respondent made a decision based on the report by HR officer and not the disciplinary hearing committee. As pointed out hereinabove, this was not applicant's pleadings in CMA F1. Therefore, this is a departure from pleadings hence cannot be allowed. More so, I have examined evidence of the parties and find that no evidence was adduced by the applicant on that aspect. In addition, it was not an issue that was raised at CMA. I therefore, cannot entertain it at this revision stage. From where I am standing, I find no evidence or

justification to fault the arbitrator. That said, I hold that termination was also fair procedurally.

For all what I have held hereinabove, I hereby uphold the CMA award and dismiss this application for want of merit.

Dated in Dar es Salaam on this 15th March 2024.

B. E. K. Mganga
JUDGE

Judgment delivered on this 13th May 2024 in chambers in the presence of Raymond Wawa, Advocate for the Applicant and Amos Enock, State Attorney for the Respondent.

B. E. K. Mganga
JUDGE