IN THE HIGH COURT OF TANZANIA

(IN THE DISTRICT REGISTRY)

AT MWANZA

HC: LABOUR REVISION NO.84 OF 2019

(Originating from the Award of the Commission for Mediation and Arbitration at Geita in CMA/GTA/23/2018), Hon. Mayale, Arbitrator, Dated 21/05/2019)

GEITA GOLD MINING LIMITED ..... APPLICANT

VERSUS

PATRICK WILLIAM ..... RESPONDENT

JUDGMENT

Last order: 05.06.2020

Judgment Date: 29.06.2020

A.Z.MGEYEKWA, J

This is an application for revision of the Commission for Mediation and Arbitration Award. The application is brought by way of Notice of Application and of Chamber Summons which is made under section 91(1)(a), 91(2)(c) and Section 94 (1)(b,(i) of the Employment and Labour Relations Act, 2004

and Rule 24 (1),(2)(a)-(f), 24 (3)(a)-(d) and Rule 28 (1) (a)(c)(d) and (e) of the Labour Court Rules, 2007 and accompanied by an affidavit deponed by Gregory Lugaila. The respondents challenged the application by filing a Counter-Affidavit and a Notice of Opposition.

The hearing was conducted by written submission whereas the applicant filed his submission in chief on 26th May, 2020. The respondent filed his reply as early as 1st June, 2020, and Rejoinder was filed on5th June, 2020. Both parties complied with the court calendar.

The applicant in his chamber summons prayed for the following orders:-

1. *That this Honourable Court be pleased to call for records and revise the proceedings and the award of the Hon. Arbitrator, Mayale dated 17th October, 2018 in Geita CMA. Labour Dispute No. CMA/GTA/22/2018 pursuant leave of this Honourable Court No. 92 of 2018.*
2. *This Honourable Court be please to set aside the award of the Hon. Arbitrator, Mayale dated 17th October, 2018 in Geita CMA. Labour Dispute No. CMA/GTA/22/2018.*
3. *Any other relief as the Honourable Court may deem fit just to grant.*

Supporting the application, the learned counsel for the applicant submitted that the respondent was employed by the applicant on 10th October, 2010 as a Mechanic. He went on to submit that on 13th August, 2017 the Geita Gold Mining security found 80 liters of engine oil in the fore diesel tanks of LV 397, and the respondent and his fellows were inside the said vehicle. The learned counsel for the applicant further submitted that the respondent was called before the applicant's disciplinary committee and was accused for breaching the applicant's disciplinary policy and procedure. He further submitted that the respondent was charged and his appeal before the Managing Director was unsuccessfully thus he preferred to institute a claim before the CMA.

The learned counsel for the applicant further submitted that the CMA decided in favour of the respondent. Aggrieved, the applicant filed the instant application and their main complaint is that the Arbitrator failed to take into consideration the relevant testimony on record. He argued that DW3 saw the respondent with his conspirators filing engine oil in LV No. 397 and he reported the matter to the security. He went on to submit that DW3 evidence was corroborated by DW4 evidence. The learned counsel for the applicant continued to argue that the reported prepared by Erick Tarimo is

the one that rendered the respondent and others to be apprehended. He argued that the observation of the CMA is irrelevant and irrational.

Mr. Gregory continued to argue that the number of witnesses who called to testify is not a barrier. He referred this court to section 143 of the Law of Evidence Act, Cap.6 [R.E 2019]. He urged this court to reconsider and find that the Arbitrator was wrong to reach such a conclusion.

Submitting further, Mr. Gregory argued that the Arbitrator faulted the applicant's procedure when dealing with the respondent's case before the Disciplinary Committee and he added that the Arbitrator misdirected himself on the finding that Exh.D6 did not meet the requirements of Rule 13 of GN. No.42. He added that witnesses were called to testify and questions were asked and answered were given and recorded. Mr. Gregory went on to argue that the evidence on record shows that the charges were read over and the respondent also had a chance to defend himself.

Mr. Gregory's further argued that the Arbitrator faulted himself in finding that the investigator was also the complainant before the disciplinary committee. He argued that the findings were wrong and legally untenable

as there is no law which prohibits an investigator to be a complainant before the disciplinary committee. Mr. Gregory further argued that DW3 was just an investigator who carried his duties accordingly to Rule 7.4. 7.8.10 and 7.8.16 of the applicant's documents. He ended by stating that the Applicant followed a proper procedure for terminating the respondent's employment as partly held by the Arbitrator. He went on to blame the Arbitrator that he misdirected himself on the evidence tendered by the applicant otherwise the Arbitrator would have arrived at the irrational conclusion.

In conclusion, Mr. Gregory urged this court to revise the award of the CMA and set aside the award and find that the respondent's contract of employment was both substantively and procedurally fair.

In reply thereto, the learned counsel for the respondent argued that the respondent was terminated unfairly. He contended that the respondent at the time of termination was an acting supervisor and following his termination, the respondent instituted a claim before the CMA and he proved his case. Mr. Lutahanga further argued that the Arbitrator decision was fair as he found that the employer failed to follow a fair procedure in terminating the respondent.

Mr. Lutahanga dynamically argued that one Erick Tarimo (DW3) was the only complainant witness during the disciplinary hearing there was no any statement that he saw the respondent filling oil in LV 387 fuel tank. He forcefully lamented how could DW3 know where the oil was taken while he was at work? He added that DW3 evidence creates doubt taking to account that the respondent claimed that he had a personal conflict with DW3. Mr. Lutehanga further argued that the complainant was not working at LT workshop, he was working at the auxiliary workshop as shown in the statement of one Damian Luphate who is a LT workshop supervisor (Exh.D1) and Damiani Luphate testified that the cargo room where oil is kept is always closed and the key is kept in the office. He valiantly argued that there is no charge of house break and the oil cage was closed and DW3 failed to prove how the cage was opened or broken.

Mr. Lutehanga valiantly argued that the respondent denied having driven the said vehicle and did not direct anyone to use the vehicle. He went on to argue that as per Exh.D1 it was Mr. Ibrahim Dachi who permitted one Japheth Samuel to use the said vehicle as stated by the applicant that the respondent was just a passenger.

He continued to argue that the applicant's witnesses conceded with the respondent testified that the place where oil was taken is surrounded by CCTV cameras but there is no any CCTV footage picture that was produced before the CMA while the investigator acknowledged that the camera was operating on that particular day. He went on to argue that the CCTV footage was a clear supportive evidence to show the liability of the respondent but he was not cross-examined therefore the same cannot be disputed. To fortify his argumentation Mr. Lutehanga referred this court to the case of **Maganga Lusende v Republic**, Criminal Appeal No. 6 of 2019 criminal case.

It was Mr. Lutehanga further submission that under the Employment and Labour Relations (Code of Good Practice) G.N No. 42 Rule 13 (1) provides that; the employer shall conduct an investigation to ascertain whether there are grounds for hearing to be held. He went on to argue that however, the Rule did not explain to how an investigation will be conducted. He referred this court to the *book of The formation and termination of Employment Contracts in Tanzania by Hamidu M.M Millulu*, Chem-chem publishers, 1st Print 2013 at page 48 to 49 that:-

" One of the most important area in handling discipline at the workplace is strict adherence of the rule of natural justice which are there should be a full investigation by an unbiased to establish the facts of the case and those conducting the disciplinary hearing should keep an open mind and not prejudice the case."

He went on to argue that DW1 was an investigator of the complaint accusation at the same time he was the complainant during the disciplinary hearing the same is supported by Exh.D1 and Exh.D3 He insisted that the investigation was biased against the requirement of law.

In conclusion, he argued that it was logical and rational for the Arbitrator to hold that there the investigator was bias because he was a complainant and there was no fair reason for termination. He prays this court to dismiss the application and sustain the CMA award and findings.

In his rejoinder, the learned counsel for the applicant reiterates his submission in chief and added that the learned counsel for the respondent has failed to address all the issues and facts raised therein. He insisted that the award was not fair and just. He added that DW3 testimony before the disciplinary committee aided in the apprehension of the respondent and his

cohorts. He argued that the reason that other incidents were not reported does not exonerate the respondent with the incident at issue. He went further to argue that the assertion that the LT Workshop was locked and that one had to get approval to remove the oil is not a defence. He added that how they got out with such amount of oil is a matter of collusion and all were charged, thus there was no any biasness.

It was Mr. Gregory's further submission that saying there was no any CCTV footage tendered at the CMA to corroborate DW3 evidence is a misrepresentation of facts on record and does not exonerate the respondent from the charges. He referred this court to several CCTV footage which were included in the investigation report (Exh.D1). He distinguished the cited case of Maganga Lusinde (supra) that it is distinguishable from the facts of the instant case. He went on to argue that the complainant was not involved in decision making he added that the investigator was acquainted with the facts of the case is well placed to act as a prosecutor before the disciplinary committee more than anyone else within the Company.

In conclusion. Mr. Gregory prays this court to revise the award and set aside the CMA award in favour applicant because there was a reason for

termination and the applicant followed a fair procedure prior to the termination of the respondent's employment contract.

I have gone through CMA records and this Court duly considered the submissions of both learned counsels with eyes of caution. The issue for determination is *whether the award was improperly procured*.

It is in the record that the CMA made a finding that there was no valid reason for terminating the applicant. It is the established principle that for termination of employment to be considered fair it should base on valid reason and fair procedure. There must be substantive fairness and procedural fairness of termination of employment. The law under section 37 (2) of the Employment and Labour Relations Act, No.6 of 2004 provides that:-

" *37 (2) A termination of employment by an employer is unfair if the employer fails to prove –*

(a) that the reason for the termination is valid;

(b) that the reason is a fair reason-

(i) related to the employee's conduct, capacity or compatibility;

or

(ii) based on the operational requirements of the employer, and

(c) that the employment was terminated in accordance with a fair procedure. "

Guided by the above provision of the law, it is clear that the legislature intends to require employers to terminate employees only based on valid reasons and not their will or whims. This is also the position of the International Labour Organization Convention 158 of 1982 as stipulated under Article 4. In that spirit, employers are required to examine the concept of unfair termination based on employee's conduct, capacity, compatibility, and operations requirement before terminating the employment of their employees.

According to the facts and evidence of this case, the applicant was terminated from employment for dishonest and negligence in the performance of duties. The respondent was alleged to steal oil from the employer's premises.

I am going to address the claim raised by the learned counsel for the applicant that the Arbitrator failed to consider the relevant testimony on record. The records reveal that the applicant conducted an investigation to find out who was involved in loading engine oil in the fuel tank.

In determining the issue ***whether the procedures for termination of employment was followed fairly***, I had to refer the CMA records to find out if the employer followed a fair procedure in terminating the applicant, I am guided by the provision of section 37 (2) (c) of the Employment and Labour Relations Act, No.6 of 2004 which provides that:-

> *"A termination of employment by an employer is unfair if the employer fails to prove that the employer was terminated following a fair procedure."*

Similarly, Rule 13 of the Employment and Labour Relation (Code of Good Practice) GN.42 of 2007 provides clear the procedure for termination of employment. First and foremost Rule 13 of GN.42 of 2007 requires the employer to conduct an investigation to ascertain whether there are grounds to conduct a disciplinary hearing. I have perused the CMA records to find out if the employer followed a fair procedure in terminating the applicant, I am guided by the provision of section 37 (2) (c) of the Employment and Labour Relations Act, No.6 of 2004 which provides that:-

> *"A termination of employment by an employer is unfair if the employer fails to prove that the employer was terminated following a fair procedure."*

Equally, Rule 13 of the Employment and Labour Relation (Code of Good Practice) GN.42 of 2007 provides clear the procedure for termination of employment. First and foremost Rule 13 of GN.42 of 2007 requires the employer to conduct an investigation to ascertain whether there are grounds to conduct a disciplinary hearing. In the instant application, an investigation was conducted. The investigation report was admitted as Exhibit D1 colletively.

After a thorough perusal of the CMA record and considering what I have gathered in line with the legal requirement for procedural fairness principle in termination of employment, I have noted that the disciplinary hearing was conducted in accordance to Rule 13 of the Employment and Labour Relations (Code of Good Practice) GN. No. 42 of 2007. I have noted that the respondent conducted a disciplinary hearing whereas four-person were interviewed and one representative was present. During hearing the employer's witnesses were interviewed but the respondent representative was not given a chance to cross-examine the complainants.

I have perused Rule 13 of the Employment and Labour Relations (Code of Good Practice) GN. No. 42 of 2007 and found that there is nowhere stated

that the representative must cross-examine the employer. Nevertheless, I am also aware that the employer is not compelled to comply with the entire checklist as stipulated under Rule 13 of the Employment and Labour Relations (Code of Good Practice) GN. No. 42 of 2007. As it was observed in the case of **Sharifa Ahmed v Tanzania Road Haulage** (1980) Ltd, Labour Division, DSM, Revision No. 299 of 2014 that:-

> *" What is important is not the application of the code of checklist fashion, rather to ensure that the process used adhered to basics of a fair hearing in the labour context depending on circumstances of the parties, so as to ensure that act to terminate is not reached arbitrarily."*

The respondent lamented that he did not sign the disciplinary hearing minutes. In my view, it was not a mandatory requirement for the respondent to sign the minutes as long as he attended the said meeting. Therefore, it is vivid that the employer complied with the entire checklist stipulated under Rule 13 of GN.No.42 of 2007. In the circumstances of the case, it is my findings that the procedure was followed.

Now, turning on the issue of ***whether there was a reason for termination or whether the termination was substantively fair***, I am

compelled to observe the position of GN. 42 of 2007 Item 9 (5) of the Employment and Labour Relation (Code of Good Practice) which state that:-

> " *The reason shall not only be one of the kinds of reasons considered fair but the reason in a particular case shall be sufficiently serious to justify termination."*

The employer in order to prove the offence called four witnesses who intended to prove that the respondent was fairly terminated. It is on record that DW1, testified that he was informed by one Erick Tarimo that on 13th August, 2017 three-vehicle technicians including the respondent tried to steal engine oil. DW1 further testified that Erick Tarimo witnessed the respondent via a CCTV camera filling engine oil inside the vehicle - LV 397. DW1 was not at the scene of the crime and he said the gate was not broken, to cut it short DW1 testimony was hearsay evidence and he did not testify how the oil was stolen while the gate was not broken.

DW2, evidence testified how the respondent was employed and notified the respondent about the disciplinary committee. DW2 testimony did not prove that the respondent was engaged in the whole process of theft.

DW3, Erick Tarimo, a co-worker of the respondent testified that on 13th August, 2017 morning hours, he was with Patrick William (the respondent), Msafiri Mafuru, Kisaka Nelson, and Ndika Ketusi. DW3 evidence based on how the respondents and his fellows were moving around the premises where the oil was kept. DW3 evidence was supported by CCTV footage images. Reading, the CCTV footage it shows that around 13:56 hrs and 14:06 hrs about three people namely; Daniel Madale, Msafiri Mafuru, and Patrick William (the respondent) involved removing the buckets and the jerry cans from the store to LT and water pump workshop. The vehicle - LV397 around 14:12 hrs was driven and parked into the LME- Auxiliary store and loaded with engine oil.

DW3, alleged that the three people were communicating how to remove the oil and the respondent was facilitating the process. This allegation was never proved rather DW3 made his own story. The CCTV footage; 4C, 4D, and 1C images were tendered at the CMA. The images 4, 5, 11, 12, 15, and 16 reveal that people were moving from one place to another but the alleged respondent was not holding any vessel. It is difficult to rule out that the respondent participated in stealing the said oil. The applicant was required to furnish more evidence that could link the respondent with the alleged

offence. DW4, Senior Supervisor one Bernard Makungu testified that he received a call from DW3 who informed him that a vehicle, LV 397 which was with driver one Msafiri Mafuru and Patrick William and other people filled engine oil and was stopped at the gate. When DW4 headed to the gate he found the driver Samwel Japhet and Msafiri Mafuru and Patrick William were outside the vehicle, he inspected the vehicle and found that there was oil in one of the vehicle diesel tanks. DW4 testified that he did not know who filled in the said oil that means the responsible person who was directly connected with stealing the said oil was not clearly identified.

The respondent denied having committed the alleged offence, he testified that on 13th August, 2017 he was at the garage and on that particular day they were using LV 397 which was used by the driver namely Msafiri Mafuru and the vehicle LV379 made two trips and took 5 passengers in total. They were stopped at the gate and when DW4 investigated the vehicle he found that the vehicle was loaded with engine oil. The respondent denied having committed the said offence and the applicant did not prove otherwise instead the employer generalized that the respondent was involved in stealing the oil. There is no any proof that the respondent stole the engine oil being found in the said c=vehicle as a passenger does not

connect him with the theft of engine oil. Taking to account that vehicle LV379 was used by more than one person and made several routes.

For the aforesaid findings and circumstances of the case, I have found that the termination of the respondent was substantively unfair.

The learned counsel for the applicant contended that the CMA faulted itself for deciding that DW3 was a complainant thus he was not in a position to investing the matter. I am in accord with the learned counsel for the applicant that DW3 and DW1 are applicant's employees thus they were proving the case of their employer therefore it was not fatal for DW3 to be an investigator and complainant. The only person who is restricted to participate in the investigation is the decision-maker, the Chairman, he is not required by law to participate in investigating the case because the same will influence his/ her decision.

Addressing the issue of number of witnesses, the learned counsel for the applicant faulted the CMA findings that the number of witnesses who called to testify is not a barrier. I am in accord with Mr. Gregory observation that no number of witnesses is required to prove a case, what is relevant is

the credibility of the witness. In this case at hand the employer mounded on the witnesses who he called to prove his case. Therefore, the Arbitrator was wrong to reach such a conclusion.

Now, I am going to determine the issue of ***whether the compensation was fair***. The process of awarding the relief for unfair termination is governed by section 40 (1) of the Employment and Labour Relations Act, No.6 of 2004 which provides that:-

> " 40 (1) If an Arbitrator of Labour Court finds a termination is unfair, the Arbitrator of Court may order the employer:-
>
> (a) To reinstate the employee from the date the employee was terminated without loss of remuneration during the period that the employee was absent from work due to the unfair termination; OR
>
> (b) To re-engage the employee or any terms that the Arbitrator or Court may decide; OR
>
> (c) To pay compensation to the employee of not less than twelve months 'remuneration.' [**Emphasis supplied**].

I am in accord with the learned counsel for the applicant that the award was high, the CMA awarded a compensation of 23 months for the reason

that the matter was pending before the CMA for a sometimes. In my view, this is not a good ground for awarding compensation of 23 months' remunerations. I am saying so because both parties were waiting for the CMA to determine their matter. Additionally, in labour laws an Arbitrator or Court cannot award interest or costs what is awarded is compensation for unfair termination. Therefore, guided by section 40 (3) of the Employment and Labour Relations Act, No.6 of 2004 the respondent is entitled for compensation of 12 months remunerations. Section 40 (3) state that:-

> " 40 (3) Where an order of reinstatement or re-engagement is made by an arbitrator or court and the employer decides not to reinstate or re-engage the employee, ***the employer shall pay compensation of twelve months*** wages in addition to wages due and other benefits from the date of unfair termination to the date of the final payment." [Emphasis added].

I have considered the extent to which the termination was unfair as explained above. Therefore, I proceed to set aside the order of Hon. Arbitrator that the applicant to be paid 23 months compensation, and I order the applicant to pay the respondent 12 months' remuneration as compensation for unfair termination in a tune of Tshs. 21,839,244/=, one

month notice salary in a tune of Tshs. 1,819,937/=, severance pay and certificate of service as provided under Section 44 (2) of the Employment Labour Relations Act, No.6 of 2004.

In the final analysis, I partly allow the application to the extent explained above. Since this is a labour matter I make no order as to costs.

Order accordingly.

Dated at Mwanza this date 6th day of June, 2020.

A.Z.MGEYEKWA

JUDGE

29.06.2020

Judgment on 29th day of June, 2020 in the presence of the learned counsel for the applicant and the respondent.

A.Z.MGEYEKWA

JUDGE

29.06.2020

Right to Appeal explained.