IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LABOUR DIVISION)

AT MUSOMA

LABOUR REVISION NO. 15 OF 2019

(Arising from the award of the Commission for Mediation and Arbitration for Musoma (Hon. P.W. Samwel -Arbitrator) dated 15th December, 2015 in Labour Dispute CMA/MUS/54/2015)

COMMISSIONER GENERAL (TRA) ..... APPLICANT

VERSUS

BENJAMIN FILEMON MVUNGI ..... RESPONDENT

JUDGMENT

29th September & 23rd November, 2020

KISANYA, J.:

The applicant, Commissioner General (TRA) has filed the present application requesting this Court to be pleased to revise and set aside the decision and orders made by the Commission for Mediation and Arbitration (CMA) at Musoma in *Labour Dispute No. CMA/MUS/54/2015* in favour of the respondent, Benjamin Filemon Mvungi. The application is supported by affidavit deponed by Hospsis Maswanyia, learned advocate for the applicant.

Before proceeding further, I find it pertinent to depict, the factual background which lead to this application, albeit briefly. On 1st January, 2012, the respondent was employed by the applicant as a Preventive Assistant. At the time of employing him, he was inter alia required to fill in the Personal Particulars Form. One of the items thereto required him to mention his former employment and employer. The respondent indicated

that, he had no previous employment. Upon signing the employment contract and posted to Musoma, the applicant came to learn that, the respondent was an employee of Tanzania National Parks (TANAPA) and dismissed from employment due to misconduct. The respondent was then charged before the Disciplinary Committee for offences of concealing information regarding past employment and demonstrating behavior against TRA Ethical and Core Values contrary to schedule 2(15) and 2(24) of TRA Staff Regulations Revised Edition 2012 respectively. He was found guilty of both counts and terminated from employment with effect from 26th February, 2015. Dissatisfied, the respondent filed a labour dispute before the CMA Musoma. In its decision, the CMA held that, there was both procedural and substantive unfair termination. It went on to order that, the respondent be reinstated and his arrears paid,

Feeling that justice was not rendered, the applicant has filed the present application for revision. The reasons for revision are reflected in paragraph 7 of the affidavit in support of the application as follows:

1. *That, the Honorable Arbitrator erred in law in holding that the appellant (sic) erred procedural and substantive unfair termination of employment of the Respondent.*
2. *That, the arbitrator erred in law and in fact by failure to critically examine the reasons and evidence adduced by the applicant in terminating the employment.*

When this matter was placed before me for hearing, the applicant was represented by Mr. Hospsis Maswanyia, learned advocate. The hearing proceeded in the absence of the respondent who failed to appear without notice.

Submitting in support of the application, Mr. Hopsis started to tackle the second ground of revision. He contended that the Hon. Arbitrator failed to consider the following evidence adduced by the applicant before the CMA:-

(a) The respondent was terminated from employment after admitting to the charges leveled against him before the Disciplinary Committee.

(b) That the applicant adduced evidence to show how the respondent admitted to have committed the offences and prayed for forgiveness. The Court was urged to consider the respondent's letter (*Exhibit Annex Mvungi 12*) to such effect.

(c) The decision of the CMA was based on a copy of letter from the respondent previous employer (*Exhibit Annex Mvungi P8*) which was not tendered in evidence for being secondary evidence.

(d) Since the respondent admitted to have committed the offence, no other evidence was adduced.

It was Mr. Hopsis's contention that had the CMA considered the above evidence, it could have not made the decision it reached. He fortified his argument by citing the case of **Nickson Alex vs Plan International**, Revision No. 22 of 2014 where it was held that:

> *"Since the applicant admitted the offence he committed, even if the employer would have conducted the disciplinary action, the position would be the same as the applicant admitted the offence he committed."*

The learned counsel cited further the case of **Vedastus S. Nturangeka and Six Others vs Mohamed Trans Ltd**, Revision No. 4 of 2014 where Mipawa J (as he then was) held that, act of dishonest is a breach of rules or standard regulating conduct relating to employment. The fact that rules

and regulation are not embodied in the employment conduct does not make termination unfair.

Another case relied upon by Mr. Hospis was **University of Dar es Salaam vs David Hela and Another**, Revision No. 2 of 2014 where it was held that reinstatement cannot be ordered if there was a valid reason in terminating their employment that is substantive fairness.

Upon citing the above case, Mr. Hopsis was of the view that, the CMA failed to consider that, the respondent had confessed to have concealed information of his previous employer thereby denying the applicant (his employer) to know him. The learned counsel went on to submit that, the applicant was justified in terminating the respondent due to his misconduct and dishonest.

As regards the first ground, Mr. Hospis submitted that the respondent was terminated fairly substantively following his confession to the commission of offence. He went on to submit that, the CMA erred in holding that, the termination was procedural unfair on the reason that, the Disciplinary Committee was not properly constituted. The learned counsel argued that, under regulation 13(11) of the Employment and Labor Relation (Code of Good Practice), Rules, GN. No. 41 of 2007 (hereinafter referred as "the Code of Good Practice") employer may dispense with the Guidelines. He went on to content that, in the present case the respondent confessed to have committed the offence and that, he did not object any member of the Disciplinary Committee as per *Exhibit Annex Mvungi 14*. It was argued further by Mr. Hopsis that, even if the Disciplinary Committee was not convened, the procedural irregularities could not vitiate the employer's right of terminating an employee. He cited the case of **UDA vs Julius**

Abdu, Revision No. 225 of 2010 [Labour Court Digest 2013] where this Court held that, even if termination was procedural unfair but given the undisputed fact of previous misconduct and having found to have been substantially fair terminated, an order for compensation cannot be made.

In alternative, Mr. Hopsis argued that, even if there was procedure and substantial unfair termination, the order for reinstatement was unfair. He was of the view that, the proper recourse was an order for compensation of not more than six months' salary under section 40(1) (c) of the EALRA. However, he went on to submit that, the compensation was paid as per *Exhibit Annex Mvungi 17.*

That said, the learned counsel urged the Court to revise and set aside the award issued in favour of the applicant.

I have given the most dispassionate consideration to the arguments of the applicant and the counter affidavit filed by the respondent and in the end, I am of the opinion that, both grounds advanced in the affidavit revolve on two issues as follows: Whether the CMA erred in holding the respondent was terminated from employment both procedural and substantive unfair; and whether, the order for reinstatement and payment of salary arrears was justified.

As regards the first issue, guidance is found in section 37 (1) and (2) of the EALRA which requires the employer to terminate the employee fairly. Termination of employment becomes unfair if the employer fails to prove, among others, valid reason in relation to the employee's conduct, capacity or compatibility; and that fair procedures were complied with in terminating the employee. The duty to prove that, the termination was

both substantive and procedural fair lies on the employer. On his part, the employee's duty is simply to allege termination and that it was unfair.

Section 37(4) of the Employement and Labour Relations Act [Cap. 366, R.E. 2019 (the EALRA) read to together with rule 12 of the Code of Good Practice sets factors to be taken into account by the arbitrator or judge in deciding whether a termination by an employer is fair. For easy of understanding the discussion at hand, rule 12 of the Code of Good Practice is reproduced hereunder:

> *"(1) Any employer, arbitrator or judge who is required to decide as to termination for misconduct is unfair shall consider:*
>
> *a) Whether or not the employee contravened a rule or standard regulating conduct relating to employment;*
>
> *(b) If the rule or standard was contravened whether or not:*
>
> *(i) It is reasonable;*
>
> *(ii) It is clear and unambiguous;*
>
> *(iii)* ***The employee was aware of it, or could reasonably be expected to have been aware of it****;*
>
> *(iv)It has been consistently applied by the employer; and*
>
> *(v) Termination is an appropriate sanction for contravening it.*
>
> *(2) First offence of an employee shall not justify termination unless it is proved that the misconduct is so serious that it makes a continued employment relationship intolerable;*
>
> *(3) The acts which may justify termination are:*
>
> *(a) Gross dishonesty;*
>
> *(b) Willful damage to property;*
>
> *(c) Willful endangering the safety of others;*

(d) Gross negligence;

(e) Assault on a co -employee supplier, customer or a member of the family of, any person associated with the employer; and

(4) In determining whether or not the termination is the appropriate sanction, the employer should consider

(a) The seriousness of the misconduct in the light of the nature of the job and the circumstances in which it occurred, health and safety, and the likelihood of repetition; or

(b) The circumstances of the employee such as the employee's employment record, length of service, previous disciplinary record and personal circumstances." [Emphasis supplied].

Now starting with the issue whether the termination in the case at hand was substantive fair, it is pertinent to note that charge (*Exhibit Annex Mvungi 11*) served to the respondent had two counts. These were concealing information regarding past employment and demonstrating behavior against TRA Ethical and Core Values contrary to schedule 2(15) and 2(24) of TRA Staff Regulations Revised Edition 2012 respectively. Item 10 of the hearing form (*Exhibit Annex Mvungi-15*) shows that, the respondent was found guilty as charged. However, reading from items 8 and 9 thereto, I find no evidence was given in relation to the second count. Such evidence was not reflected in the letter of termination (*Exhibit Annex Mvungi-16*). Further, neither DW1 nor DW2 proved how the respondent committed the second offence. It follows that, the respondent was terminated basing on the first count. In that count, the applicant (employer) alleged that, the respondent did not "indicate any previous

employment before joining TRA" when filling in the Personal Particulars Form thereby contravening schedule 2(15) of the TRA Staff Regulations Revised Edition 2012.

The CMA was of view that, the respondent's termination from employment was substantive unfair on the reason that, the applicant failed to prove that, the respondent was aware of the TRA Staff Regulations when it held as follows:

> *"..fomu hiyo imo kwenye kitabu cha mwajiri kiitwacho TANZANIA REVENUE AUTHORITY STAFF REGULATIONS ambacho mlalamikaji hakuwahi kupewa kwa muda wote aliofanya kazi TRA, kwa hiyo, yeye hakuwahi kuzisoma hizo kanuni na kuzielewa kwa sababu mwajiri hakumpatia nakala ya kitabu hicho, hivyo kwa mtazamo wangu wa kisheria ni kwamba, haikuwa sahihi mwajiri kumlaumu mlalamikaji kuhusu jambo ambalo yeye mlalamikaji alikuwa halijui kuwa ni kosa.*

In his submission in support of both grounds of revision, Mr. Hopsis did not address at the above findings by the Hon. Arbitrator. Much as the respondent was alleged to have breached the rule regulating conduct relating to his employment, termination for misconduct is unfair if the respondent was not aware or could reasonably expected to have been aware of it. This is pursuant to regulation 12 (1) (b) (iii) of the Code of Good Practice. It is on record that the offence was committed at the time of employing the respondent. The applicant did not adduce evidence to prove that, the TRA Staff Regulations was availed to the applicant at the time of filling in the personal particulars form. Furthermore, it was not

stated in the personal particulars form that failure to fill in the correct information is breach of the schedule to the TRA Staff Regulation.

It was submitted at length by Mr. Hopsis that, the respondent confessed to have committed the offence. In other words, the learned counsel contended that, the respondent confessed have been employed by TANAPA before joining TRA and concealed that information. His argument was based on *Exhibit Annex Mvungi 12.* However, reading the said *Exhibit Annex Mvungi 12*, I am of the view that, the respondent's plea of guilty to the first count was qualified. This is so when it considered that, he stated that he was under probation period and that his contract of employment was expect to start after being confirmed.

> *"Kwa utaratibu wa kazi hapo nilipewa kipindi cha matazamio cha miezi kumi na mbili (12 month) yaani probation period. Endapo ningemaliza kipindi cha matazamio bila shida basi ningethibitishwa kazini na kuajiriwa rasmi na TANAPA. Wakati nipo kwenye kipindi cha matazamio kulijitokeza tofauti..."*

Such fact is also reflected in item 8 of the Hearing Form (*Annex Mvungi 15)* filled in by the Chairman of the Disciplinary Committee as the respondent's response to the allegation. The same reads:-

> *"Brief summary of employee's response to the allegation....*
>
> *- He agreed that he was employed by TANAPA as Account Assistant.*
>
> *- He was not an employee as he was in probation period hence he did not fill those particulars as he was*

not given a certificate of service. So he had no document to attach/ support."

In my view, the respondent's reply as per *Exhibit Annex Mvungi 12 and 15* cannot be taken as a plea of guilty (confession) thereby finding him guilty of that offence. The said response raised the issue whether a person terminated during probation is regarded as employee. That issue was neither addressed by the Disciplinary Committee nor stated in the termination letter.

For the reasons herein, I find no reason to fault the CMA's decision. It is clear that, the respondent termination was substantive unfair.

In relation to the issue whether or not the termination was procedural fair, the CMA noted the following procedural irregularities: One, the Disciplinary Committee was not properly constituted. Two, the management did not adduce evidence to prove its charge. Three, the respondent was terminated by the Commissioner General in lieu of the Director of Human Recourses and Administration.

Mr. Hopsis argument against the CMA's decision was to the effect that, the applicant had a right of terminating the respondent from employment after confessing to have committed the offence. However, I have discussed at length how the respondent's plea of guilty or confession was equivocal. Further, he was found guilty of the second count while he did not confess to have committed the same. This implies that, the charges levelled against the respondent were not proved. Further, the Disciplinary Committee lacked mandate to determine the matter because it was not properly constituted. Lastly, the respondent was denied the right to appeal within the TRA mechanism because he was terminated by the

Commissioner General who was supposed to determine his appeal in relation to the finding and penalty reached by the Disciplinary Committee. It is my considered opinion that, the above procedures which were not complied with could not be dispensed with by the applicant under regulation 13 (11) of the Code of Good Practice as Mr. Hopsis tried to convince this Court. They go to the root of the matter.

From the foregoing, the proceedings of the Disciplinary Committee of TRA were vitiated. Consequently, the decision and orders made thereto were also vitiated. I accordingly, exercise the power vested in this Court to nullify and set aside the proceedings, decision and orders made basing on the findings of the Disciplinary Committee. However, the proceedings before the CMA remain intact. This stance was taken by the Court of Appeal in **Elia Kasalile vs Institute of Social Work**, Civil Application No. 187/18 of 2018, CAT at Dar es Salaam (unreported), where it held as follows upon facing similar situation:-

> *"Since the applicants were denied the right to be heard only before the Disciplinary Committee, the proceedings which were supposed to be quashed and nullified were those of the Disciplinary Committee only not those before the CMA and the High Court. We are accordingly convinced that the Court made an error and the same is manifest on the record. We therefore correct that error by removing the above parts of the Court's judgment and replace them with the words" we quash all the proceedings of the Disciplinary Committee and the decision thereat" It therefore follows that the proceedings before the CMA and the High Court remain intact and valid."*

Guided by the above case law, the CMA findings that the respondent termination from employment was substantive and procedural unfair remain intact and valid.

The last issue for consideration is whether the CMA was justified in ordering that, the respondent be reinstated. I am guided by the provision of section 40(1) of EALRA which provides for the rights of the employee whose employment is terminated unfairly as in the case at hand. The said provision states:-

> *"If an arbitrator or labour court finds a termination is not fair, the arbitrator or court may order the employer-*
>
> *(a) To reinstate the employee from the date the employee was terminated without loss of remuneration during the employee was absent from work due to unfair termination: or*
>
> *(b) To re-engage the employee on any terms that the arbitrator or court may decide: or*
>
> *(c) To pay compensation to the employee of not less than twelve months remuneration."*

Reading from the above provision, I find that the arbitrator or this Court has the discretion to award any of the above stipulated three reliefs upon finding that, the employee was terminated unfairly. The arbitrator or Labour Court is thereby required to exercise its discretion judiciously. The law is settled that, discretionary power cannot be challenged unless it is proved that, it was unreasonably exercised. See for instance, **Elia Kasalile vs Institute of Social Work** (supra) when the Court of Appeal held:

"This is the position of the law as it now stands. It vests the arbitrator and the court with the discretion to decide which remedy or relief fits certain circumstances. There must, however, be justification for the decision to be made.

Mr. Vedasto's contention that since the termination of employment was found to be unfair then the innocent applicants ought to have been reinstated is interesting but this is a Court of law hence bound to apply the law as it is until it is either amended or declared null and void through proper procedures. "

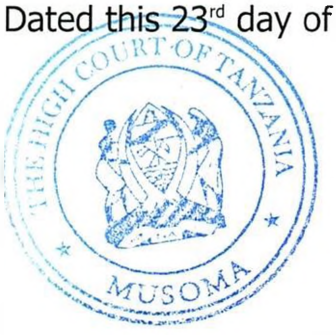
In the present case, the CMA's order for reinstatement was based on the reason that, there was no evidence adduced by the applicant to prove the offences levelled against the applicant and that, the Disciplinary Committee was not properly constituted. This Court has stated herein how the said offences were not proved by the applicant. Mr. Hopsis argued that, the order for reinstatement was unfair to the applicant. However, he did not substantiate on how the said order was unfair in order this Court to interfere with the said discretion.

The learned counsel argued further that, the CMA ought to have made an order for compensation of not more than six months' salary and that, the applicant had already paid the said compensation. Section 40(3) of EALRA is very clear. In the event the employer does not wish to reinstate or re-engage the employee, he is required to pay compensation. There is no evidence to prove compensation paid to the respondent. According to *Exhibit Annex Mvungi-17,* the respondent was paid one month basic salary, housing allowance, transport allowance, repatriation expenses.

That was not a compensation within the meaning of section 40(3) of EALRA.

In the final analysis, the CMA's decision that, termination of the respondent from employment was substantive and procedural unfair is hereby confirmed. However, this application partly succeeds on the order issued by the CMA in that, the applicant may wish to pay compensation in lieu of reinstating the respondent. In the consequence, the relief or order issued by the CMA is substituted by the order to the effect that: The applicant is hereby ordered to either reinstate the respondent in his employment under section 40 (1) (a) of the ELRA or pay him twelve months' salaries in terms of section 40 (3) of the said Act if she does not want to reinstate him. It is so ordered.

Dated this 23rd day of November, 2020.



E. S. Kisanya
JUDGE

Court: Judgment delivered this 27th day of November, 2020 in the absence of the parties. Bench Clerk Mr. J.J.Katundu, RMA present.

M. A. MOYO
DEPUTY REGISTRAR
27/11/2020