THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(LABOUR DIVISION)

AT MBEYA

REVISION NO. 09 OF 2018

(Originating from the Complaint Ref. CMA/MBY/132/2017 from the Commission for Mediation and Arbitration for Mbeya at Mbeya)

MULTI CHOICE TANZANIA LTD.....APPLICANT

VERSUS

FELIX NYARI.....RESPONDENT

JUDGEMENT

Date of Last Order: 27/11/2019
Date of Judgment: 13/02/2020

MONGELLA, J.

The Applicant herein is moving this Court to revise and set aside the award of the Commission for Mediation and Arbitration for Mbeya in Labour Dispute No. CMA/MBY/132/2017. The application is brought under section 91(1) (a), (b), 2 (b), 4(a), (b) and 94 (1) (b) (i) of the Employment and Labour Relations Act, No. 6 of 2004 and Rules 24 (1), 2 (a), (b), (c), (d), (e), (f), 3 (a), (b), (c), (d) and 28 (1) (b), (c), (d), (e)of the Labour Court Rules, G. N. No. 106 of 2007. It is supported by the affidavit of one Mulamuzi Patrick Byabusha, the Applicant's counsel. The application was argued by written submissions.

The brief facts of the case are as follows: The Respondent was employed by the Applicant as a Regional Sales Coordinator for the Southern Zone. On 25/12/2016 he was involved in an accident while driving an office vehicle whereby a pedestrian was knocked and died. The said vehicle was also damaged something which led him to be subjected to disciplinary proceedings by his employer. The disciplinary committee reached a verdict whereby the Respondent was given a *"Final Warning Letter."* The Applicant was dissatisfied by this decision and appealed against the decision of the disciplinary committee. The outcome of this appeal led to the termination of the Respondent's employment with the Applicant. The Respondent then instituted labour claim at the CMA claiming a sum of T.shs. 578,100,000/- as compensation for unfair termination. The Arbitrator however, awarded the Respondent a sum of T.shs. 153,178,192/- as payment for compensation, severance pay, notice and leave. Aggrieved by this award, the Applicant has knocked the doors of this Court for redress.

In his submissions, Mr. Byabusha raised two issues for determination by this Court. First, Whether the Hon. Arbitrator addressed himself on substantive and procedural issues during arbitration. Second, whether the Hon. Arbitrator considered and properly analysed the justification of compensation before awarding the same to the Respondent.

On the first issue, Mr. Byabusha argued that the Hon. Arbitrator did not address the issue of proof on balance of probability by the Applicant. He said that the Applicant, during the hearing in the CMA proved at least on balance of probability that the reason and procedure for termination was

fair. He cited the case of ***Tanzania International Container Terminal Services (TICTS) Ltd. v. Shabani Kagere***, Misc. Application No. 188 of 2013 (HC, Lab. Div.-DSM) in which it was held that the burden of proof lies with the employer, but it is not beyond reasonable doubt as in criminal matters. It is on balance of probabilities. The Court went ahead and ruled that what is important is the application of the Code in checklist fashion, but rather to ensure that the process used adhered to 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. He argued that basing on this decision, each case has to be determined according to its peculiar circumstances, however, the Hon. Arbitrator failed to do that and disregarded the Applicant's evidence on the occurrence of events.

Mr. Byabusha further argued that the appellate body is not duty bound to recall the employee and employer for re-hearing. In support thereof he referred to Rule 4(14) of the Employment and Labour Relations (Code of Good Practice) G. N. No.42 of 2007 which states that: "*the manager considering the appeal must record the outcome of the appeal in the appropriate part of the original disciplinary form and return a copy to the employee*." Thus, he argued, the Applicant proved the case on balance of probability that the reason and procedure for termination was fair. He stated that two witnesses from the Applicant Company demonstrated clearly that the complainant unequivocally admitted the charge and the verdict by the Disciplinary Committee. That, the Arbitrator admitted without objections all documentary evidence tendered during trial. He as well cited the case of ***Othman R. Ntarru v. Baraza Kuu la Waislamu***

Tanzania (BAKWATA), Revision No. 323 of 2013 (HC-Lab Div., DSM) in which it was also held that the law puts the burden of proof to the employer to prove that he had sufficient reasons and followed the required procedure in terminating the service of the employee.

On the second issue, Mr. Byabusha argued that the Hon. Arbitrator awarded the Respondent severance pay disregarding the fact that the Respondent admitted to have committed misconduct. He referred to section 42 (3) (a) of the Employment and Labour Relations Act, 2004 (ELRA) which provides that severance pay is not payable upon fair termination on ground of misconduct. He also cited the case of ***Dar es Salaam Corridor Group Ltd. v. Stephen Mrema***, Revision No. 282 of 2013 (HC-Lab Div., DSM) in which the Court reiterated the position under section 42 (3) (a) of the ELRA.

Mr. Byabusha also challenged the award of T.shs. 153,178,192/- which included compensation for 36 months' salary, severance pay for four years the Respondent worked with the Applicant, one month notice, one annual leave, transport costs and subsistence allowance for five months and fifteen days from the date of termination to the determination of the award. He argued that this amount was exorbitantly awarded to the Respondent without being justified. He cited the case of ***John Lume v. Arusha Gymkhana Club***, Revision No. 94 of 2013 (HC-Lab Div., Arusha). He further argued that on cross examination the Respondent admitted to have fabricated the claims for compensation and general damages. He cited the case of ***Bolag v. Hutchson*** [1950] AC 515 which explained about special damages. The Court stated that special damages must be proved

strictly. On general damages, Mr. Byabusha argued that case law bars quantification of general damages. That, it suffices to plead them and leave it upon the Court to determine the sum awardable. To this effect he cited the case of ***Tanzania-China Friendship Textiles Co. Ltd v. Our Lady of Usambara Sisters*** [2006] TLR 70. He argued that the Hon. Arbitrator awarded the Respondent general damages of T.shs. 30,000,000/- on the unfounded and unproven allegations that he paid school fees for his young sister and brother and that the marital relationship of the Respondent was not good. He added that there was no evidence to prove the existence of the dependents and the marital status. That the said claims were fictitious and the Hon. Arbitrator regarded them at the expense of the Applicant.

The Respondent was represented by Mr. Isaya Mwanry, learned Advocate. Mr. Mwanry vehemently challenged the Respondent's Advocate's submissions. In reply thereof, he framed four issues being: (i) whether the employer had a right to appeal against his own disciplinary machinery's verdict; (ii) whether the employee was fairly involved in the so called appeal against the disciplinary machinery; (iii) whether the CMA was proper to find reasons for termination unfair;(iv) whether the remedy awarded by the CMA was proper and according to the law. In rejoinder, Mr. Byabusha argued that these were new issues not in reply to his submission in chief and thus ought to be disregarded by this Court. In my considered opinion however, I find the (i), (ii), and (iii) issues raised by Mr. Mwanry to be addressing the procedural issues in termination of the Respondent's employment and thus replying to the first issue raised by Mr. Byabusha in his submission in chief. The (iv) issue is on the award awarded

to the Respondent by the CMA, therefore replying to the second issue raised by Mr. Byabusha. I therefore do not subscribe to his argument that they ought to be disregarded by this Court. I shall thus consider the Respondent's submissions accordingly.

Arguing on the termination of the Respondent which resulted from the appeal by the Applicant in his company's disciplinary process, Mr. Mwanry contended that under the current labour laws, the employer has no right to appeal against the decision of his own disciplinary committee. He argued that under the labour laws of this Country that right is only reserved to an employee. In support of his argument he cited Rule 4 (12) of the Employment and Labour Relations (Code of Good Practice) G.N. No. 42 of 2007 providing for guidelines for disciplinary, incapacity and incompatibility policy and procedures. The provision specifically states:

> *"An employee may appeal against the outcome of a hearing by completing the appropriate part of the copy of the disciplinary form and give it to the chairperson within five working days of being disciplined, together with any written presentations the employee may wish to make. The chairperson must within five working days refer the matter to the more senior level of management, with a written report summarizing reasons for the disciplinary action imposed. The appealing employee must be given a copy of this report."*

Mr. Mwanry argued that this is the only provision under the labour laws providing for a right to appeal against the outcome of a disciplinary hearing. In support of his arguments he cited persuasive decisions from the Labour Court in South Africa whereby he argued that the labour laws of these two countries somehow resemble. The cases are: ***South African***

Revenue Service v. The Commissioner for Conciliation Mediation and Arbitration, Case No. DA7/11, Labour Appeal Court of South Africa at Johannesburg and that of ***South African Revenue Service v. The Commissioner for Conciliation Mediation and Arbitration & 2 Others***, Case No. C 683/11, Labour Court of South Africa at Cape Town. In both cases it was held that the employer has no right to appeal against the decision of the disciplinary committee as there is no rule that specifically states as such. Mr. Mwanry further argued that the "Final Written Warning" delivered by the disciplinary committee of the Applicant cannot be altered by the Applicant/employer to impose his own decision. That the option that the employer had was to refer the dispute to an independent institution which is the CMA under section 86 of the ELRA.

Mr. Mwanry challenged the Applicant's Advocate's argument that the Hon. Arbitrator failed to address the issues on proof on balance of probability by the Applicant. He argued that the Applicant as an employer failed to prove on balance of probabilities because he failed to provide evidence as to what were the grounds of appeal, when was the appeal entertained, who determined the appeal, and whether the Respondent was given the copy of the appeal. That the Respondent through a letter (MCT5) was informed that there would be an appeal against him, but the letter did not disclose the date, venue and appellate committee particulars. Rather, he was in the end given a termination letter which was the result of the appeal. He further added that the proceedings of the appellate committee were never provided before the CMA, hence failed to prove if the Respondent was given the right to be heard. He argued that the right to be heard has been a crucial

component of fair labour practices in determining fairness of termination. He cited the case of ***National Microfinance Bank v. Rose Laizer***, Revision No. 123 of 2014 (HC-Lab Div. at Arusha) in which the Court held:

> *"Let me commence by repeating the importance of the right to be heard, which has been subject in a number of decisions including the apex court, the CAT. The legal position is that, the right of a party to be heard before adverse action or decision is taken against such a party has been stated and emphasized by the Court in numerous decisions. That the right is so basic that a decision which is arrived at in violation of it will be nullified even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of principle of natural justice."*

Mr. Mwanry challenged the provision of Rule 4 (14) of G. N. No. 42/2007 relied upon by Mr. Byabusha. He argued that the said provision does not provide that the employee has no right to be represented on appeal, to defend himself or to properly mitigate. Rather, it provides for the procedure for the manager who determines the right of appeal of an employee and not the employer. He added that Rule 4 (14) must not be read in isolation, but in harmonization with Rule 4 (13) of the Guidelines for Disciplinary, Incapacity and Incompatibility Policy and Procedures G. N. No. 42/2007. He further argued that the appeal was filed out of time thus whatever that was decided by the appellate committee was not proper and cannot stand in this application. Likewise it makes the Applicant not to have complied with the fair procedure on terminating the Respondent.

Mr. Mwanry also addressed Mr. Byabusha's contention that the Applicant's witnesses demonstrated that the Respondent unequivocally

admitted without objections all documentary evidence tendered during trial. He argued that the Respondent was given a charge which had four counts and he replied to that charge. After few days he was called to the disciplinary hearing faced new offence not listed in the charge. He said that despite these anomalies the committee still found the Respondent guilty and punished him with a final written warning (Exhibit MCT4). That the Respondent showed that there was a big difference on the misconduct alleged in the charge sheet, the disciplinary hearing form and the termination letter. That the Respondent never agreed that he was grossly negligent but was terminated on the bases gross negligence. He added that the Respondent admitted some facts so as to save the company from getting loss and he told the same thing during the hearing therefore the plea was not unequivocal as argued by Mr. Byabusha. He cited thereof the case of ***SBC Tanzania Ltd. v. Fanueli Haule***, Revision No. 66 of 2013 (HC Lab Div. at Mbeya) in which the Court did not adversely consider admissions that an employee made to save his employment. He added that the termination letter stated that the Respondent had breached the rule under paragraph 13.1.2 (c) (i) and (k) of the Multi Choice Tanzania Human Resource Manual, however, the said manual was not tendered before the Commission. That the failure to tender that material document entitled the CMA to draw an adverse inference on the Applicant. He was of the view that it is the manual which can depict whether the offence committed is sanctioned to termination or not. Mr. Mwanry concluded on this issue arguing that the procedure and reasons for termination were unfair. The reasons were unfair for being ambiguous and inconsistent as they were changed from time to time.

Regarding the remedies awarded by the CMA, Mr. Mwanry contended that the CMA correctly awarded the payment of severance allowance. He argued so saying that since the Hon. Arbitrator ruled that the termination was both substantively and procedurally unfair, then the issue of misconduct warranting non-payment of severance pay vanishes. The Respondent was thus entitled to severance pay as provided under section 42 (1) (2) (a) & (b) of the ELRA.

On payment of compensation to the tune of 36 months' salaries, Mr. Mwanry argued that the same was within discretion of the Hon. Arbitrator and ambit of the law. He cited the case of ***Isaac Sultan v. North Mara Gold Mines Limited***, Consolidated Labour Revisions No. 16 and 17 of 2018 (HC Lab. Div. at DSM, unreported) whereby the Court awarded a compensation of 90 months' salaries after finding that the termination was unfair. He also cited the case of ***Coca Cola Kwanza v. Hery Sanga***, Revision No. 49 of 2015 (HC at Mbeya, unreported) in which the Court never interfered with the award of compensation by the arbitrator of 48 months' salaries after seeing that there are justifiable reasons. He argued that since the termination was both substantive and procedural unfair, the Respondent deserved compensation of 36 months' salaries as per Rule 32 (5) (b) of the Labour Institutions (Mediation and Arbitration Guidelines) Rules, G. N. No. 67 of 2007. He added that the Applicant claims that the payment is excessive but he has not advanced sufficient arguments on how and to what extent the same is excessive.

Mr. Mwanry further argued that the Respondent is entitled to the one month payment in lieu of notice because the same is a statutory right as

provided under Rule 44 (1) (d) of G. N. 67 of 2007. That, the Respondent is also entitled to annual leave payment because he had not taken his leave at the time he was terminated. With regard to general damages, Mr. Mwanry argued that the Respondent demonstrated before the Court the loss that he has suffered including his status being tarnished by the charge of gross negligence to the extent of him not getting another job easily, and failure to pay school fees for his siblings. The CMA considered that and saw that he deserved to be paid general damages to the tune of T.shs. 30,000,000/- though he pleaded for T.shs. 300,000,000/-.

On transportation costs, Mr. Mwanry argued that the Respondent was entitled to be paid even though he did not plead the same in CMAF 1. He argued that the Respondent was recruited from Dar es Salaam and was stationed at Mbeya as seen in the employment contract and termination letter (MCT1 and MCT4 respectively). He stated that the same has been dealt with in a number of decisions by this Court such as ***Eddy Martin Nyinyoo v. Real Security Group & Marine***, [2013] LCCD 7 whereby it was held:

> *"The rule stands for proposition that, an award can be made of rights which in law follow the decision. Example in a case of employment termination, an award of severance pay, notice, transportation to place of recruitment may be made even if not claimed. This is because the said payments are payable as right under section 41, 42 and 43 of ELRA No. 06/2004"*

He further argued that subsistence allowance is one of repatriation package paid on daily basic wage of the employee from the date of termination to the date of repatriation. He cited the case of ***General***

Manager, Pangea Minerals Ltd v. Migumo Mwakalasya, Revision No. 35 of 2008 (HC at DSM, unreported) in which Rweyemamu, J. stated:

> *"Where employment is terminated at a place other than where the employee was recruited, the law requires payment of daily subsistence expenses during the period, if any between the date of termination and the date of transporting the employee to the place of recruitment."*

He also cited Regulation 16 (1) of the Employment and Labour Relations (General) Regulation, G. N. No. 47 of 2017 which provides that "*subsistence expenses provided for under section 43 (1) (c) shall be quantified into daily basic wage or as may be determined from time to time by the relevant wage board.*" He argued that since the Respondent has not been paid the said payment this Court can consider adding the amount for dates that have increased since the same was awarded by the CMA. He added that such payment is payable to the employee regardless of whether the termination is fair or not.

In rejoinder, Mr. Byabusha only insisted that the CMA award was excessive and unjustified as the Respondent failed to substantiate the amount claimed during trial. He argued that even in the case of ***Coca Cola Kwanza*** (supra) and under section 40 (1) (c) of ELRA cited by Mr. Mwanry, compensation beyond twelve months has to be justified, something which does not feature in the case at hand.

I have keenly considered the submissions by both counsels as well as the affidavits filed by the parties thereof. To this juncture I find that there are two main points calling for determination by this Court. The first is on

whether the termination of the Respondent's employment contract was fair; and the second is on whether the reliefs awarded by the CMA are justifiable.

The root of this dispute stems from the appeal against the decision of the disciplinary committee that passed a verdict of final warning to the Respondent. Mr. Mwanry challenged the act of the Applicant appealing against his own disciplinary committee. This issue was underscored by my learned sister, Wambura, J. in the case of ***National Bank of Commerce v. Aprukelia Mlowe***, Revision No. 888 of 2018 (HC, Lab. Div. at DSM, unreported) whereby she held:

> *"...it is not a common ground for the employer to appeal against its own disciplinary organ, but it is possible where the institutional policy provides so."*

Wambura, J. went ahead and quoted with approval the South African case of ***AUSA obo Melville/SA Airways Technical (Pty) Ltd*** [2002] 6 BALR 573 (AMSSA) whereby it was held:

> *"**If an employer wishes to reserve the right to review in an appeal hearing a sanction imposed by the disciplinary committee then this must be clearly stated in the Appeal Policy Procedure.** Furthermore the employee should be warned by the Chairperson of the same. **The Policy must also stipulate the powers of all the disciplinary committees and not make a mockery of the first instance of the disciplinary hearing.**"* (Emphasis added).

Considering the decision in the above cited cases, the Appellant had a duty to prove that he in fact had such a policy in his company. I have

gone through the CMA record and found no policy being presented for the CMA or this Court to refer to and come up with a proper decision basing on what is exactly provided in the said policy and whether the same is in conformity with the labour rules of this Country. This was also pointed out by the Hon. Arbitrator in his award. Failure to present such a policy for evidence, the Appellant as an employer failed to discharge his duty of proving fairness in the termination procedure.

In addition, the record of the CMA clearly shows that the Respondent was not called to attend the hearing in this appeal. The appeal was made to the HR Business Partner of Multichoice East Africa. The termination letter (MCT4) dated 22nd September 2017 shows that the Respondent was terminated on the offence of Gross Negligence and Misconduct contrary to Paragraph 13.1.2(c), (i), (k), and (l) of the Multichoice Tanzania Human Resource Manual. Just like the Hon. Arbitrator noted, the said manual was also never presented and does not form part of the record for this Court to deal with. I also in fact agree with the argument by Mr. Mwanry and the reasoning by the Hon. Arbitrator that this was a new offence because it does not feature in the list of offences that the Respondent was charged with in the disciplinary committee he attended for the first instance. In accordance with **Rule 13 of the Code of Good Practice, G.N. No. 42 of 2007**, the Respondent ought to have been given time to prepare his defence on this new offence and accorded a chance to defend himself. Failure to accord the Respondent the chance to defend amounted to procedural irregularity.

The Respondent as I pointed out was terminated for gross negligence and misconduct. **Rule 12 (2) of the Code of Good Practice, G.N. No. 42 of 2007** provides that:

> *"The 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."*

Under Rule 12 (3) (d) of the Code of Good Practice, gross negligence has been listed to be among the acts which may justify termination. I therefore expected the Applicant's witnesses to demonstrate at the hearing in the CMA on how the accident in which the Respondent was involved amounted to gross negligence and misconduct or made a continued employment relationship intolerable to warrant the said termination. Mr. Byabusha argued that the Respondent admitted to have been negligent when involved in the accident that consumed his employment. However, as argued by Mr. Mwanry, the Respondent never admitted being grossly negligent and that was not was he was charged with initially. Under the circumstances, proof of gross negligence by the employer was imperative so as to prove that the termination was substantively fair. In my settled view therefore the Applicant as an employer failed as well to prove that the termination was substantively fair.

Mr. Byabusha challenged the reliefs awarded by the Hon. Arbitrator whereby he awarded a total of T.shs.153,178,192/- divided as follows: T.shs. 97,200.000/- which is 36 months' salary as compensation for unfair termination; T.shs. 2,900,000/- as severance pay; T.shs. 2,700,000/- as one

month salary in lieu of notice; T.shs. 2,700,000/- as annual leave not taken; T.shs. 30,000,000/- as general damages. T.shs. 120,000/- as transport allowance (bus fair) for him and two dependants; T.shs. 120,000/- as meal allowance; T.shs. 2,880,500/- as transport of personal belongings; and T.shs. 14,557,692/- as subsistence allowance from 22/9/2017, which is the date of termination to the date of the award with a provision of it accruing till the date he is repatriated.

Mr. Byabusha argued that the reliefs were awarded without justification. The ELRA under section 40 (1) (c) provides for compensation of at least twelve months' salary. This is a minimum requirement and the law gives a room of increasing the amount. The amount to be paid as compensation can however, be increased depending on the circumstances under which the termination occurred. Having ruled that the termination was both substantive and procedural unfair, I find no fault in the award issued by the Hon. Arbitrator for 36 months' salary. I thus confirm it accordingly. On the same reasons I find that the Respondent is also entitled to severance pay. He is as well entitled to payment in lieu of notice as he was terminated without notice and payment for leave not taken. The Respondent being recruited from another region he is entitled to repatriation package and subsistence allowance even though not pleaded in the CMAF 1. See: ***Eddy Martin Nyinyoo v. Real Security Group & Marine*** (supra) and ***General Manager, Pangea Minerals Ltd v. Migumo Mwakalasya*** (supra). Since the Applicant never challenged the calculation of repatriation package and subsistence allowance by showing the amounts chargeable under his company policy and the law

I find the repatriation package and subsistence allowance as awarded by the Hon. Arbitrator to be correct and I approve the same.

The Hon. Arbitrator awarded general damages to the tune of T.shs. 30,000,000/- basing on the evidence adduced by the Respondent. Mr. Byabusha argued that the Hon. Arbitrator awarded the Respondent the said general damages on the unfounded and unproven allegations that he paid school fees for his young sister and brother and that the marital relationship of the Respondent was not good. He added that there was no evidence to prove the existence of the dependents and the marital status. That the said claims were fictitious and the Hon. Arbitrator regarded them at the expense of the Applicant. Upon perusal of the CMA records, I found that the Respondent claimed also claimed that the termination on ground of gross negligence and misconduct has tarnished his image and it shall be difficult for him to obtain employment elsewhere. In my settled view, the proof in general damages is not in the same standard as in specific damages. An allegation of facts showing the consequence of the act can suffice for the court to assess and decide upon the amount to be granted. See: ***National Bank of Commerce Limited v. Lake Oil Limited***, Commercial Appeal No. 5 of 2014 (HC Commercial Div. at DSM, unreported); ***MS FishCorp Limited v. Ilala Municipal Council***, Commercial Case No. 16 of 2012 (HC Commercial Div. at DSM, unreported). I find the concern that it shall be difficult for the Respondent to obtain employment elsewhere given the reason for his termination to have merits in being granted general damages. However, as also argued by Mr. Byabusha, general damages are not to be quantified by the claimant as it was done by the Respondent. It only

suffices to plead them and leave it to the Court to decide. Nevertheless, in my view, the quantification of the general damages by the Respondent does not disentitle him to be awarded the same because they are at the end awarded in the discretion of the Court. Having awarded the Respondent compensation for 36 months' salary, I find the award of T.shs. 30,000,000/- as general damages to be excessive. I therefore reduce the general damages to the tune of T.shs. 10,000,000/-.

In the upshot, I find that the termination was unfair both substantive and procedural. The Applicant is to pay the Respondent a sum of **T.shs. 133,178,192/-** as enumerated in this judgment. The exact sum for payment of subsistence allowance shall however, accrue on the date the Respondent is repatriated to his place of recruitment. The award of the CMA is upheld to the extent stated in this judgment. The Applicant's application is therefore dismissed.

Dated at Mbeya on this 13th day of February 2020.

L. M. MONGELLA
JUDGE
13/02/2020

Court: Judgment delivered in Mbeya in Chambers on this 13th day of February 2020 in the presence of Mr. Isaya Mwanry, learned Advocate for the Respondent.

L. M. MONGELLA
JUDGE
13/02/2020