IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SONGEA DISTRICT REGISTRY)

AT SONGEA

LABOUR REVISION NO. 6 OF 2019

(Originating from Labour Dispute No. CMA/RUV/SON/MAY/14/2017)

TANCOAL ENERGY LIMITED..... APPLICANT

VERSUS

ATHMAN RASHID.....RESPONDENT

Date of last hearing: 13/02/2020

Date of Judgment: 31/03/2020

JUDGMENT

I. ARUFANI, J:

This judgment is for the application filed in this court by the applicant, TANCOAL Energy Limited seeking for revision of an award issued in favour of the respondent, Athman Rashid by the Commission for Mediation and Arbitration for Ruvuma at Songea (herein referred to as the CMA) in CMA/RUV/SON/NOV/14/2017 dated 22nd June 2018. The application is made under sections 91(1)(a), 91(2)(b) and 94(1)(b)(i) of the Employment and Labor Relations Act, Act No. 6 of 2004, Rule 24(1),(2),(3) and rule 28 (1) (a),(b), (c), (d) and (e) of the Labor Court Rules, G.N No. 106 of 2007 and any other enabling provision of the law and supported by an affidavit sworn by Richard Nditi.

The background of the matter as discernible from the record of the CMA is to the effect that, the respondent was employed by the applicant as a driver from 1st July, 2013 and worked up to 20th November, 2017 when his employment was terminated on disciplinary ground of being found guilty of gross misconduct. It was alleged that, the respondent showed a dishonest behavior by stealing fuel of the applicant when he was operating a Wheel Loader Machine of the applicant. The respondent was dissatisfied by the decision of terminating his employment and referred his grievances to the CMA which found his termination was unfair. The CMA ordered the respondent be reinstated in his employment and paid all of his dues from when he was terminated from his employment.

The applicant was dissatisfied by the decision of the CMA and come to this court beseeching for revision of the decision of the CMA. The grounds used by the applicant to move the court to revise the award of the CMA as deposed under paragraph 4 of the affidavit supporting the application are to the effect that:-

a. *That the CMA erred in law and facts to hold that the complainant salary at the time of termination of his employment was 700,490/= without justification to the same.*
b. *That the CMA erred in law and fact to decide the matter contrary to the law by awarding the respondent in the day where the parties were absent.*

c. *The CMA erred in law and facts to decide the matter contrary to the law by awarding that the applicant did terminate the respondent without reason for termination while the reason was that the respondent stole fuel at working place.*

During hearing of the application, the applicant was represented by Mr. Dickson Pius Ndunguru, learned advocate and he was assisted by Mr. Jackson Mpangala, learned advocate while the respondent was represented by Mr. Guerinous Mgima from TUICO. The counsel for the applicant prayed to abandon the ground contained in paragraph 4(b) of the affidavit supporting the application and proceed to argue the rest of the grounds.

The counsel for the applicant told the court in relation to the ground in paragraph 4(a) of the affidavit that, the CMA erred in law and fact to hold the complainant's salary per month was Tshs. 700,490/= while throughout the evidence adduced before the CMA they did not say so. He said the Arbitrator used the said salary to calculate the salaries of the respondent for a period of seven months he was out of his employment and get Tshs 4,903,430/= while his salary was Tshs 450,000/= per month.

Coming to the second ground for revision which is stipulated at paragraph 4(c) of the affidavit, the respondent's counsel argue that, the CMA erred in law and facts to hold that there was no justifiable reasons for terminating the respondent employment, while it was proved the respondent stole the fuel of his employer at his working place. He told the court that, the stated reason justified fairness in termination of

employment of the respondent. The learned advocate argued that, as provided under Rule 12 (3) (a) of the GN. No. 42 of 2007, gross dishonest is a fair ground for termination of employment hence termination of employment of the respondent was fair. Finally he prayed the court to revise the award of the CMA and confirm the respondent termination of his employment.

In reply Mr. Mgima argued in relation to the ground contained in paragraph 4 (a) of the applicant's affidavit that, he is agreeing with the counsel for the applicant that the CMA erred in law and facts to calculate the respondent salaries basing on Tshs. 700,490/= instead of Tshs. 700,049/= which is appearing in the salary slip of the respondent of August, 2017 which was his salary during termination of his employment. He said the argument by the counsel for the applicant that the salary of the respondent was Tshs. 450,000/= per month is not true as the respondent salary was Tshs. 700,049 per month.

He argued that, if the applicant found the CMA erred in using a wrong figure in calculating the salaries of the respondent they were required to go back to the CMA under section 90 of the Act No. 6 of 2004 or the applicant was required to bring the application to this court under section 95 of the Civil Procedure Code, Cap 33 R.E 2002. He argued that, as the applicant failed to invoke the cited provision of the law in the application they have caused the court to lack jurisdiction of entertaining the application at hand.

Coming to the second ground contained in paragraph 4 (c) of the affidavit of the applicant the respondent's representative argued that, what make a person to be found guilty of the offence he has committed is the evidence available. He said the applicant failed to adduce sufficient evidence to show the respondent committed the offence leveled against him that is why the CMA found the reason for termination of his employment was unfair.

He referred the court to section 37 (1) and (2) of the Act No. 6 of 2004 which provides for the requirement to establish termination of employment of an employee is fair and justifiable. He also referred the court to Rule 12 (1) of the GN No. 42 of 2007 which he said was not complied with. He said that, although under that rule the respondent was supposed to be taken to an independent committee for determination of his matter but one Robert Shitobelo who was the complainant's representative appeared in the disciplinary committee which determined the respondent's matter. He said that shows justice was not done to the respondent.

He also referred the court to the case of **Modern Confectionary Bakery V. Juma Abdallah**, Labour Revision Case No. 155 of 2010 whereby Hon. Moshi, J dismissed the application after seeing Rule 12 (1) (a) of GN No. 42 of 2007 was not complied with in termination of employment of an employee. He further referred the court to the case of **TTCL V. Augustino Kibando**, Labour Revision No. 122 of 2009 where Hon. Rweyemamu, J (as she then was) dismissed the application for revision on the ground that, section 37 (2) (a) and (b) of Act No. 6 of 2004

and Rule 13 of GN No. 42 of 2007 were not complied with. Finally he prayed the court to find the application is delaying the rights of the respondent and dismiss it so that the respondent can get his rights.

In his rejoinder the counsel for the applicant told the court that, there is no clerical error in the award of the CMA which would have required them to go back to the CMA for correction but a defect in the proceedings of the CMA. He said as there was no evidence in the proceedings of the CMA to support the award the right procedure to challenge the award is the one provided under section 91 of Act No. 6 of 2004 which requires an aggrieved party to go to the High Court if there is an error in an award of the CMA. He contended that, section 95 of the Civil Procedure Code is not applicable in the matter at hand because there are labor laws governing this matter and there is no lacuna in those laws to justify using of that provision of the law.

He argued in relation to the appearance of the complainant's representative one Robert Shitobelo in the Disciplinary Committee that, Rules 12 and 13 of GN No. 42 of 2007 do not states the complainant's representative was not required to appear in the Disciplinary Committee. He argued further that, the issue of independence of the Disciplinary Committee which determined the respondent matter was not raised and determined by the CMA. He stated that, even their application is not based on a ground of the independence of the Disciplinary Committee or Rules 12 and 13 of GN No. 42 of 2007 were violated.

As for the cases cited by the respondent's representative the counsel for the applicant argued that, all of them are distinguishable from the case at hand as both of them were dealing with a situation where Rule 12 (1) (a) of GN No. 42 of 2007 was violated while the application at hand is not based on violation of the mentioned Rule. He said their argument is that, while the CMA found there was no justifiable reason for termination of the respondent's employment but on their side they are saying there was justifiable and fair reason for terminating his employment. He said that reason was proved before the Disciplinary Committee and before the CMA that the respondent was guilty of dishonest under Rule 12 (3) (a) of GN No. 42 of 2007. At the end he prayed the application to be granted and the award made by the CMA be reversed.

After carefully considered the arguments from both sides and going through the grounds for revision of the award of the CMA filed in this court by the applicant the court has found that, it is proper to start with the point of law raised by the respondent's representative that, the application was supposed to be brought to this court under section 95 of the Civil Procedure Code. He said as the application is not made under that provision of the law then the court has no jurisdiction to entertain the matter. The court has found the respondent's representative has misconstrued application of the said provision of the law.

The court has arrived to the above finding after seeing that, the said provision of the law is used where there is no any other law which can move the court to prevent the end of justice and not otherwise. The court has found as rightly argued by the counsel for the applicant, labor matters

are governed by labor laws and where there is no lacuna in the labor laws parties and the court are not required to resort into other laws to deal with labor matters. Since there are laws governing the matter filed in this court by the applicant and are rightly cited in the applicant and there is no lacuna in the labor laws in respect of the matter before the court the court has found there is nothing which can make it to lack jurisdiction of entertaining the matter at hand. In the premises that point has been found is devoid of merit.

There is another point raised by the respondent's representative that, as Robert Charles Shitobalo (DW2) who was the applicant's dispatch superintendent participated in the Disciplinary Committee which dealt with the case of the respondent then the Disciplinary Committee was not independent. The court has found that, as rightly argued by the counsel for the applicant it is true that, the issue of independence of the Disciplinary Committee in the determination of the respondent's matter was neither raised and determined by the CMA nor raised in any of the grounds filed in this court by the applicant. Since it is a new issue which was neither raised nor determined by the CMA and it has not been raised in the matter before the court as a ground for revision of the award made by the CMA the court has found it cannot be entertained by the court at this stage.

Back to the grounds for revision filed in this court by the applicant the court has found proper to start with the ground contained in paragraph 4 (c) of the affidavit supporting the application. The court has found the issue to be determined in that ground is whether the CMA erred in finding the reason for termination of employment of the respondent was not fair.

Thereafter I will deal with the ground contained in paragraph 4 (a) of the affidavit supporting the application which is requiring the court to determine whether calculation of the respondent's rights was based on wrong figure of the salary of the respondent at the time of termination of his employment.

Starting with the first issue the court has found as stated at the outset of this judgment and argued by the counsel for the applicant the respondent's employment was terminated because of allegation that he committed the offence of gross misconduct which is stealing the fuel of his employer (the applicant). The court has found the offence of gross misconduct as stated in the letter of termination of the employment of the respondent dated 20th November, 2017 is defined under clause 7.1.2(g) of the applicant's Company Code of Conduct and Ethics to include theft, fraud and other dishonesty acts.

The court has also found that, the acts which may justify termination of employment of an employee as provided under Rule 12 (3) (a) of the GN No. 42 of 2007 cited by the counsel for the applicant includes gross dishonesty of an employee. To the view of this court what is stated in the clause of the applicant's Company Code of Conduct and Ethics cited in the respondent's letter of termination is almost similar to what is provided in the rule cited hereinabove. That being the position the court has found its duty as provided under Rule 12 (1) (a) of the GN No. 42 of 2007 is to decide whether the evidence adduced before the Disciplinary Committee and the CMA proved the respondent committed the alleged offence of

gross misconduct. For clarity purposes the cited Rule 12 (1) (a) of the GN No. 42 of 2007 states as follows:-

> *"12.-(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."*

While being guided by what is provided in the above provision of the law the court has gone through the evidence adduced before the CMA to see whether the evidence adduced there managed to establish the offence leveled against the respondent was proved to the required standard. The court has found that, as appearing in the evidence of Beno Herman Mapunda, Robert Charles Shitobelo and Boniface Saimon Musa who testified for the applicant as DW1, DW2 and DW3 respectively, the respondent was charged with the offence of stealing fuel of his employer after the Wheel Loader Machine he was driving on the date of event being found closer and parallel to the coal motor vehicle which was found with a pipe wetted by fuel. The evidence of the applicant's witnesses shows that, after the respondent's machine being found in such a situation it was suspected fuel had been stolen from his machine and put in the coal motor vehicle.

The court has found that, after the applicant's leaders arrived to the above suspicion the machine of the respondent together with other machines and coal motor vehicles which were at the place of event were

taken to the fuel bay for being refilled with fuel and it was discovered the Machine of the respondent and another one which was being driven by one Gadiel had consumed a lot of fuel compared with other machines and the hours they had worked. It was also said by DW2 and DW3 that, the coal motor vehicle which was found parallel to the respondent's machine and had a wet pipe was found with more fuel than the fuel which was supposed to be found in it.

The finding of this court in relation to the above evidence of the applicant's witnesses is that, it was a mere circumstantial evidence as there was no witness said to have seen the respondent stealing fuel in his machine and put it into the coal motor vehicle found parallel with his machine and suspected it had been filled with fuel stolen from the respondent's machine. To the view of this court a mere finding of a pipe wet with fuel in the coal motor vehicle which was parallel to the respondent's machine was not enough to establish the respondent had stolen fuel from his machine and put it in the coal motor vehicle.

The court has arrived to the above finding after seeing that, despite the fact that it was said by DW2 and DW3 that the machine of the respondent was examined and found with a big shortage of the fuel compared with the hours it had worked and the coal motor vehicle found parallel to the respondent's machine was found with a big amount of fuel than the amount which it was supposed to have but that was not enough to prove the respondent stole the fuel of his employer.

The court has arrived to the above finding after seeing that, the respondent stated in his evidence that he was not the first person to use the machine from when it was filled with fuel. He said that, when the machine was filled with fuel it was under the use of his fellow driver who was in the night shift and when the machine was handed to him in the morning it had already been used by his fellow driver during the night. Moreover, there is no evidence adduced to show how much fuel was in the machine when it was handed to the respondent. That evidence of the respondent makes the court to be of the view that, there was a big possibility of the fuel being used or stolen by his fellow driver who was in the night shift before the machine being handed to him.

As there is no evidence adduced to establish how the driver who the respondent said was in the night shift with the machine was cleared out of the shortage alleged was found in the machine which was being used by the respondent the court has found it cannot be said with certainty that it was proved on balance of preponderance of probability as stated in the case of **Tropical Pesticides Research Institute V. Sebastian F. Mlingwa** [2015] LCCD 212 that the appellant stole the fuel of the applicant. The requirement for the applicant to prove the respondent committed the offence leveled against him is getting support from the position of the law stated in the case of **Hamid Mfaume Ibrahim V. KBC Tanzania Ltd,** [2014] LCCD 13 where the court state that;

> *"the law under section 112 of the Evidence Act, cap 6 RE 2002, provides that: "the burden of prove as to any particular facts lies on that person who wishes the court to believe in its*

existence, unless it is provided by law that the proof of such facts shall lie on any other person". And in ***Abdul Karim Haji V. Raymond Nchimbi Alois and Joseph Sita Joseph*** *(2006) TLR 420 the court held that, "it is elementary principle that he who alleges is the one responsible to prove his allegation".*

Since there was no sufficient evidence to prove the respondent committed the offence of theft of the applicant's fuel it cannot be said termination of his employment was fair. The Court of Appeal made an emphasis in the case of **Elia Kasalile & 20 others V. The Institute of Social Work,** Civil Appeal No. 145 of 2016, CAT at DSM (unreported) to the employer to make sure that, before terminating employment of an employee the reason for termination is fair as provided under section 37 of the Act No. 6 of 2004. In the light of what has been stated hereinabove the court has found the ground for revision contained in paragraph 4 (c) of the affidavit supporting the application has no any merit as there was no sufficient evidence to prove the respondent committed the offence used to terminate his employment.

Back to the ground contained in paragraph 4 (a) of the affidavit supporting the application the court has found that, the argument by the counsel for the applicant that there was no evidence adduced before the CMA to show the salary of the respondent at the time of termination of his employment was TZS 700, 490/= is not supported by the record of the CMA. The court has found the testimony of the respondent as appearing at page 17 of the typed proceedings of the CMA shows that, he said he was

employed by the applicant on 1st July, 2013 at the salary of TZS 700,490/= and that evidence was not counted anywhere by the applicant. To the contrary the court has found the figure of TZS 450,000/= said by the counsel for the applicant was the salary of the respondent at the time of termination of his employment is not appearing anywhere in the record of the CMA.

The court has come to the view that, as the respondent's representative argued the figure of TZS 700,490/= used by the CMA to calculate the amount to be paid to the respondent is not correct and said the correct salary of the respondent per month was TZS 700,049/= the court has found the right avenue to correct calculation of the amount which was supposed to be paid to the respondent is to go back to the CMA under section 90 of the Act No. 6 of 2004. It was not proper for the applicant to come to this court by way of revision provided under section 91 of the Act No. 6 of 2004 for correction of the stated wrong calculation of what was supposed to be paid to the respondent.

The court has considered the cases of **Modern Confectionary Bakery** and **TTCL V. Augustino Kibando** (supra) cited by the respondent's representative to support his arguments and said by the counsel for the applicant are distinguishable from the case at hand but failed to say if they are relevant or distinguishable from the case at hand as their copies were not supplied to the court to enable it to see whether they are relevant to the matter at hand or not.

In the premises and basing on all what I have stated hereinabove the court has found there is no justifiable ground to revise the award issued by the CMA in favor of the respondent. The wrong calculation of what was awarded to the respondent by the CMA can be corrected by the CMA under section 90 of the Act No. 6 of 2004 if the parties will move the CMA to do so. In the upshot the application is hereby dismissed for want of merit. It is so ordered.

Dated at Songea this 31st day of March, 2020

I. ARUFANI

JUDGE

31/03/2020

Court:

Judgment delivered today 31st day of March, 2020 in the presence of Mr. Makame Sengo, Advocate holding brief of Mr. Dickson Ndunguru, Advocate for the applicant and the respondent is present in person. Right of Appeal to the Court of Appeal is fully explained to the parties.

I. ARUFANI

JUDGE

31/03/2020