IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LABOUR DIVISION)

AT MUSOMA

CONSOLIDATED LABOUR REVISIONS NO. 12 AND 14 OF 2020

(Arising from the award of the Commission for Mediation and Arbitration for Musoma (Hon. Solleka H.-Arbitrator) dated 27th March 2020 in Labour Dispute Number CMA/MUS/67/2017)

BONIPHACE JOHN MBESHERE ..... APPLICANT

VERSUS

NORTH MARA GOLD MINES LIMITED ..... RESPONDENT

JUDGEMENT

30th October, 2020 and 29th January, 2021

KISANYA, J.:

The applicant, Boniphace John Mbeshere was employed by the respondent, North Mara Gold Mines Limited in the position of watchman/security officer. On 19/08/2016, five large packages of GBM were stolen at the area where he was assigned to guard. He was then charged before the Disciplinary Committee. In terms of the charge sheet (Exhibit D-2), six counts were leveled against him. These were stealing of company property, collusion to steal company property, violation of security regulations, dealing in or assisting others to unlawfully obtain company property, committing an act amounting to dishonest in performance of duty and failure to report incident.

The disciplinary proceedings proceeded in the absence of the applicant. In the end, he was found guilty as charged. On 24/2/2017, the applicant was informed of the Disciplinary Committee's findings and his right to appeal

within five days from 24/2-1/3/2017 (Exhibit D-6). Since the respondent failed to appeal, he was terminated from employment with effect from 2/3/2017 (Exhibit D-7).

Dissatisfied, the applicant appeared before the Commission for Mediation and Arbitration (henceforth "the CMA") where he lodged a labuor dispute/complaint. Pursuant to CMA Form No.1, he claimed to have been terminated unfairly and prayed for reinstatement and a clean certificate of service. Challenging the applicant's claims, the respondent called two witnesses who tendered 8 exhibits. Both witnesses gave evidence to justify the reasons for terminating the applicant's employment and procedures employed thereto. Upon hearing the parties, the CMA was satisfied that, the termination was substantively and procedurally unfair. In consequence, compensation of 14 months' salary was awarded in favour of the applicant.

Both parties were deeply aggrieved. Each of them preferred an application for revision of the CMA's award. The applicant filed Labour Revision No. 12 of 2020. He is faulting the CMA for not granting the order for reinstatement as prayed in CMA Form No. 1. Therefore, he has moved the Court to quash the compensation awarded by CMA and issue the order for reinstatement in lieu thereof. On the other side, the respondent filed Labour Revision No. 14 of 2020. She is challenging the CMA's findings that the applicant's termination from employment was substantive and procedural unfair together with the reliefs awarded thereto. Therefore, the respondent has asked the Court to consider the issue whether the reasons and procedures for termination of the applicant's employment were not proved to be fair and set aside the CMA's award.

When this matter was placed before for hearing on 5/10/2020, Mr. Alihaji Majoro and Mr. Frank Mwalongo, learned advocates appeared for the applicant and respondent respectively. With consent of the parties' counsel, the two applications were consolidated together as "Consolidated Labour Applications No. 12 and 14 of 2020". The controlling record was stated to be Labour Revision No. 12 of 2020. That is why Boniface John Mbeshere and North Mara Gold Mines Ltd are respectively referred to as the applicant and respondent. Furthermore, the Court ordered the parties to dispose the matter by way of written submissions.

Both counsel filed their respective submissions in accordance with the the Court's order/schedule. I will consider the learned counsel's submission in the course of addressing issues pertaining to this matter. In view of the parties' applications, affidavits and submissions, this Court is of the view that, the issues worthy of consideration are:

1. *Whether the termination of the applicant's contract of employment was substantively and procedurally unfair.*
2. *Whether the compensation awarded by the CMA is lawful.*

The first issue is based on the application filed by the respondent. Mr. Mwalongo submitted that, the respondent proved how the applicant committed offences that led to his termination. In other words, Mr. Mwalongo was of the view that the applicant's termination from employment was substantively fair. He contended that, evidence to such effect was adduced by DW2 who tendered the audio interview (Exhibit D-8) in which, the applicant admitted to have been at the scene of crime where the properties were stolen; and assigned to operate the machine involved in the commission of the said offence. It was Mr. Mwalongo's argument that, the

applicant admitted the said evidence on the reason that he did not challenge the same during cross examination. He fortified his argument by citing **Sarkar on Evidence**, 14th Ed, 1993, Vol. 2 at page 2007 where the author states that:

> *"...whenever a statement of fact made by a witness is not challenged in cross-examination, it has to be concluded that the fact in question is not disputed."*

Therefore, Mr. Mwalongo argued that, the reason for termination was valid and fair because it was proved that the applicant committed the offence which led to his termination.

As regards the procedure for termination, the learned counsel submitted that the CMA erred in holding that the procedure for Disciplinary Proceedings were not complied with by proceeding in the absence of the applicant who was sick. Mr. Mwalongo contended that, the Disciplinary Proceedings proceeded in the absence of the applicant due to the fact that, he was examined by Dr. Mazengo and found fit to participate in the hearing process (page 2 of Exhibit D-2). The learned counsel went on to submit that the applicant admitted to have been treated by Dr. Mazengo.

That said, Mr. Mwalongo was of the view that, the applicant's termination was substantively and procedurally fair.

Responding to the first issue, Mr. Majogoro submitted that what was admitted by the applicant in the audio CD (Exhibit D-8) is the fact that he was driving vehicle with number GM2. He contended that it was not proved whether the said car was involved in the theft incident. His argument was based on the evidence of Enock Ngukah (DW2) who admitted that, the CCTV

footage did not show the number of vehicle and the therein. Mr. Majogoro submitted further that, Exhibit D-8 cannot supersede the CCTV and that, the applicant did not involve in the theft incident.

In relation to the procedures for termination, Mr. Majogoro argued that, the Chairman of the Disciplinary Committee erred in proceeding with the hearing while the applicant was sick. He argued further that, the alleged certification by Dr. Mazengo did not defeat the fact that the applicant was sick. The learned counsel went on to submit that sickness was a sufficient ground for adjourning the disciplinary hearing and that, the respondent could not have prejudiced anyhow. Making reference to the case of **Huseein Khanibahi vs Kodi Rlph Siara**, Civil Revision No. 25 of 2014, Mr. Majogoro argued that the applicant was not granted the right to be heard. He submitted further that, the proceedings of the Disciplinary Committee (Exhibit D5) do show evidence adduced by the applicant to prove the charges against the applicant.

Rejoining, Mr. Mwalongo reiterated his submission that, the evidence to prove the offences against the applicant is his admission (Exhibit D-8). He was of the view that admission is the best evidence and that, other pieces of evidence including the CCTV footage, were in addition to admission. The learned counsel submitted that, Dr. Mazengo's certificate that, the applicant was fit to proceed with the hearing was not challenged by the applicant. He was of the view that, the said evidence ought to have challenged by other medical evidence. In that regard, Mr. Mwalongo was of the firm view that, the Chairman of the Disciplinary Committee was justified in proceeding with hearing and that, the applicant was not denied the right to be heard. He concluded that evidence adduced before CMA proved on the balance of

probabilities that, the respondent had fair reason of terminating the respondent and that, the disciplinary hearing was justified.

On my part, section 37 of the Employment and Labour Relations Act [Cap. 366, R.E. 2019] (the ELRA) bars the employer to terminate the employee unfairly. The termination is unfair if the employer fails to prove validity and fairness of the reason for termination and/or fairness of the procedure for termination. This is provided for under section 37(2) of the ELRA is reproduced hereunder:

> *"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."*

In the light of the above, an employee can only be terminated from employment if there are valid and fair reasons for termination and conducted in accordance with fair procedures. Therefore, it must be proved by the employer that the termination was both substantive and procedural fair.

According to the charge sheet, the letter of intention to terminate him from employment and the termination letter, the applicant was charged and found guilty of stealing of company property, collusion to steal company

property, violation of security regulations, dealing in or assisting others to unlawfully obtain company property, committing an act amounting to dishonest in performance of duty and failure to report incident. The the offences were committed on 19/8/2016 at around 0527 hours whereby, the applicant was alleged to have colluded with other employees namely, Zephrine Muzungu, Said Biseko Masau, Abel Faustine, Nyagone Daniel, Geofrey Sadock and Paul Mvukiye who stole five large packages of GBM belonging to the applicant.

All offences preferred against the applicant relates to his conduct. This is a valid and fair reason for terminating the contract of employment. The issue is whether the said offences were proved against the applicant.

The respondent tendered the proceedings of the Disciplinary Committee (Exhibit D-5) to prove her case. However, the said proceedings do not show evidence adduced before the Disciplinary Committee. The witnesses called and the exhibits tendered before the said Committee are not reflected in Exhibit D-5. Therefore, the evidence relied upon by the Committee in finding the applicant's guilty of the charged offences is not clear

As regards evidence adduced before the CMA, the Hon. Arbitrator was satisfied that the applicant's conduct which led to termination was not proved. The said decision was based on the fact that, the CCTV (Exhibit D7) relied upon by the respondent did not show the person in the machine or vehicle involved in the theft incident. The counsel for the respondent does not challenge the CMA's findings in relation to CCTV (Exhibit D7). He faults the CMA for failure to consider the audio CD (Exhibit D-8) in which, the applicant was interviewed and admitted to have been at the scene of crime where the offences was committed; and assigned to operate the

machine/vehicle involved in the commission of the said offence. In other words, Mr. Mwalongo asked this Court to consider the Audio CD (Exhibit D-8) as evidence which proved the applicant's conducts/offences that led to his termination from employment.

An audio CD is an information presented in an electronic form. It is therefore a "data" within the meaning of section 3 of the Electronic Transactions Act, 2015. The conditions for admission of data generated or stored by electronic (electronic evidence) is governed by section 18 (2) of the Electronic Transactions Act, 2015 which provides:

> *"In determining admissibility and evidential weight of data message the following shall be considered:-*
> *(a) The reliability of the manner in which the data message was generated, stored and communicated;*
> *(b) The reliability of the manner in which the integrity of the data message was maintained;*
> *(c) The manner in which the original was identified; and*
> *(d) Any other factor that may be relevant is assessing the weight of evidence"*

All of the above conditions have to be proved by the party asking the Court to admit the electronic evidence. In so doing, the respective party is required to lay foundation pertaining to compliance with the said conditions.

The audio CD (Exhibit D-8) in the case at hand was tendered by DW2. He introduced himself as the respondent's investigator. He did not state whether he was the maker of the said audio CD and how the same came into his possession. Also, DW2 did not give any evidence related to reliability of the manner in which audio CD was generated or stored, its integrity

maintained and the original identified. I find it pertinent to reproduce his evidence on this matter:

Q. Una ushahidi gani mwingine.

A. Mahojiano ya sauti.

Q. Umetuzwa vipi

A. Katika CD.

Q. Pamoja na mkanda wa video ya Camera, unaonesha gari aliokuwa anatumia mlalamikaji.

Q. Ungependa CD ipokelewe kama kielelezo.

A. Kielelezo D-8.

From the above, the respondent through DW2 in particular, did not assure the CMA on the reliability of the information generated, stored and maintained in audio CD and that the same could not be accessed or tampered with by any other person. Therefore, this Court finds that the mandatory provision of section 18(2)(a) and (b) and (4) of the Electronic Transactions Act were not complied with. For that reason, Exhibit D-8 cannot be considered.

Consequently, there remains no evidence upon which the respondent relies on to prove the valid and fair reason for terminating the applicant. What remain, is the evidence that, the applicant was assigned to guard the area where the properties were stolen. In my view, such evidence was by itself, not sufficient to prove the offences levelled against the applicant.

Procedurally, the record shows that the applicant was sick when matter was called on for hearing before the Disciplinary Committee on 24/2/2017 at 0930 hours. The matter was then adjourned to 1400hours. When the Disciplinary Committee reconvened at 1432 hours, the applicant informed

the Committee that he was not fit to participate due to sickness. The Chairman called one, Dr. Robert Mazengo who was of the opinion that, the applicant was **mentally fit** to proceed with the hearing. The said Dr. Mazengo did not say anything about attending the applicant and **his body condition**. Evidence as to the applicant's body condition is reflected in the statement of the applicant's representative (page 4 of Exhibit D5) who stated that:

> *"Boniface J. Mbeshere RPF officer...called for DH today 24/02/2017 at 0800 AM but she was sick during the hearing he vomited two times, we called a doctor to attend him he gives (sic) him a medicine, but we didn't proceed due to illness and lastly he vomited again. Chairman postpone (sic) the hearing... At 1400 hours we went to the hearing but Mbeshere wasn't able to come in panel, hence we moved to clinic to proceed with hearing but the same he could so....I can't represent him because Chairman decide (sic) to proceed with the hearing while Mbeshere is not able to do so."*

In view of the above, I am of the opinion that the applicant was sick at the hearing of the matter before the disciplinary hearing. Sickness is a sufficient reason which can affect a party to appear and or defend the case against him. In that regard, the Disciplinary Committee ought to have adjourned the matter. It follows that, the applicant's right to be heard guaranteed under the Constitution of the United Republic of Tanzania provided for under and rule of the Employment and Labour Relations (Code of Good Practice) Rules, 2007, GN No. 42 of 2007 was contravened. Therefore, the applicant's termination from employment was procedural unfair.

At this juncture, the Court finds that the applicant's termination from employment was substantively and procedurally unfair. There is no reasons to fault the CMA decision on this matter.

I now move to the second issue raised in the applicant's application. It is premised on the order for compensation granted by the CMA. While admitting that the arbitrator has a discretion of awarding compensation of not less than 12 months, Mr Majogoro argued that he was duty bound to state the reasons for not awarding the order for reinstatement prayed by the applicant. He went on to argue that, none of the exceptions for reinstatement provided for under of rule 32 of GN No. 67 was proved in this case.

Citing the cases of **Isaac Sultan vs North Mara Gold Mines Ltd,** Consolidated Labour Revision No. 16 and 17 of 2018, HCT at Musoma. **Amina Mbakire vs DED Geita**, Labour Revision No. 13 of 2019, HCT at Mwanza and **Mantra Limited vs Joaqium Bonaventure**, Civil Appeal No. 145 pf 2018, CAT at DSM, Mr. Majogoro argued that this Court has power of varying the relief or compensation awarded by the CMA. He was of the considered view that, the applicant ought to have been reinstated or compensated under section 40(3) of the ELRA, in the event the respondent considers the reinstatement impractical.

In rebuttal, Mr. Mwalongo argued that the Arbitrator has discretion to award compensation instead of reinstatement. He supported his argument by referring this Court to the case of **Elia Kasalile and 17 Others vs Institute of Social Work,** Civil Application No. 187/18 of 2018, CAT at DSM (unreported) where it was held among others that:

"...the arbitrator and the High Court cannot be faulted for opting to order the Applicant be paid compensatory wages instead of being reinstated. Even section 40(1) of the EARL provides that discretion. The exercise of discretional power is not a ground for review."

It was further argued by Mr. Mwalongo that, grant of the order for reinstatement in this case will be improper on the reason that the applicant has spent almost 4 years in Court. He fortified his argument by citing the case of **Elia Kasalile and Others** (supra) where the period of one and a half years was considered as a just reason for ordering compensation in lieu of reinstatement. The learned counsel went on to submit that the Court cannot vary the compensation by increasing the amount awarded thereto because that issue was not raised in the ground for revision.

I have considered the parties rival arguments on the second issue. It is not disputed that, the relief sought by the applicant in CMA Form No. 1 was an order for reinstatement. In terms of section 40(1) of the ELRA, reinstatement is one of the reliefs to an employee whose termination is found to be unfair. Other reliefs, are re-engagement and compensation. Any of the said reliefs can be granted by the Arbitrator or Labour Court depending on the circumstances of each case. In any case, the CMA or Labour Court is required to consider whether to grant the relief prayed or otherwise. In the event the relief prayed cannot be granted, reasons for that decision should be given. This position was stated in **Mantra Tanzania Limited** (supra) when the Court of Appeal held:

"Since the respondent had prayed for that relief, it is imperative that, after having found that his termination was substantially and

procedural unfair, the High Court ought to have considered whether or not to grant that relief...

In our considered view therefore, by omitting to do so, the High Court strayed into an error. The argument by Mr. Vedasto that the learned High Court Judge properly exercise her discretion in granting compensation to the respondent instead of ordering his reinstatement is with respect, incorrect. This is because of the obvious reasons that the learned Judge did not all consider that the crucial issue, therefore, the....."

In the present case, the Hon. Arbitrator awarded the order for compensation and not reinstatement prayed in CMA Form No.1. The applicant's counsel is of the view that, the Hon. Arbitrator did not consider the relief prayed or give the reasons for not granting the same. Reading from the CMA's award and the authorities cited therein, I find that the reason was given. The relevant part of the decision of the CMA is quoted hereunder:

"Kwa mujibu wa CMA F.1 mlalamikaji aliomba kurudishwa kazini na kupewa hati safi ya utuishi. Hivyo kama nilivyoeleza hapo juu katika hadidu rejea za awali ya kwamba mlalamikaji aliachishwa kazi isivyo halali, kwani hakukuwa na sababu za msingi za kumwachisha kazi na pia taratibu za kuachishwa kazi hazikuzingatiwa. Hivyo kwa kuwa sijaona sababu ya kubatilisha maamuzi hayo, naamuru kuwa mlalamikaji alipwe fidia ya mishahara ya miezi kumi nan ne (14) ...Fidia hiyo inatokana na mwajiri kushindwa kufuata taratibu halali wakati wa kumuachisha kazi mlalamikaji (procedure unfairness)."

It is noteworthy here that, in awarding compensation in lieu of reinstatement prayed in CMA Form No. 1, the CMA considered that, the applicant had been terminated procedurally unfair. Indeed, according to rule 32(2) (a) (d) of the Labour Institutions (Mediation and Arbitrators Guidelines) Rules, GN. No. 67 of 2007, the arbitrator cannot order reinstatement or re-engagement if the termination is procedural unfair. Since it is in evidence that, the applicant's termination was also procedurally unfair, the CMA was justified in exercising its discretion and grant compensation of 14 months' salary. As rightly held by Mr. Mwalongo such discretion cannot be faulted. This stance was taken in **Elias Kasalile and 17 Others** (supra) when the Court of Appeal held:

> "*Further, according to the principles for review set in the case of National* ***Bank Of Kenya Limited v. Ndungu Njau and Chandrankat Joshubhai Patel*** *v, The Republic (supra), the arbitrator and the High Court cannot be faulted for opting to order the applicants be paid compensatory wages instead of being reinstated.* "

Even if I was to consider whether to grant the order for reinstatement, I agree with Mr. Mwalongo that grant of such order would be impartible. This is so after considering that, the applicant has been out of office for almost three years and one month. Further to that, he was charged before the Disciplinary Committee on the allegation of stealing his employer's properties. In such a case, the parties working relationship might not be good if the order for reinstatement is granted. Thus, such order is not suitable in the circumstances of this case.

In his submission, Mr. Majogoro was of the view that the compensation given by the CMA was inadequate and moved the Court to vary it. I agree with Mr. Mwalongo that, the issue whether the compensation was inadequate or not was not advanced in the grounds for revision and the prayer sought in the affidavit in support of the application. The applicant's main concern was the CMA's failure to grant the order for reinstatemen.

It follows that, the inadequacy of the compensation awarded by CMA was stated for the first time in his submission. The law is settled that, submission is not part of evidence. It cannot be taken into account as such by the court. See **The Registered Trustees of the Archi Diocese of Dar es Salaam vs the Chairman Bunju Village Government & 11 others**, Civil Appeal No 147 of 2006(unreported). Furthermore, parties are bound by their own pleadings. For the foresaid reasons, this Court cannot consider the issue whether or not the compensation was adequate.

In the result, I find no merit this matter. Accordingly, both applications (Labour Revision No. 12 of 2020 and Labour Revision No. 14 of 2020) are hereby dismissed. On the other hand, the CMA's award dated 30th March, 2020 is hereby upheld. Any party aggrieved by this decision has a right of appeal to the Court of Appeal.

Dated at MUSOMA this 29th day of January, 2021.

E. S. Kisanya
JUDGE

Court: Judgment delivered through video conference this 29th February, 2021 in attendance of Mr. Alihaji Majogoro, learned advocate for the applicant and Mr. Faustine Mwalongo, learned advocate for the respondent. B/C Ms Mariam present.

E.S. Kisanya
JUDGE
29/01/2021