

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(LABOUR DIVISION)**

**AT MUSOMA**

**APPLICATION FOR LABOUR REVISION NO. 19 OF 2020**

*(Arising from the Award of the Commission for Mediation and Arbitration for Musoma (Hon. Soleka H.-Arbitrator) dated 23<sup>rd</sup> June, 2020 in Labour Dispute No. CMA/MUS/43/2017)*

**NORTH MARA GOLD MINE LIMITED ..... APPLICANT**

***VERSUS***

**JAMES EMMANUEL MAHA ..... RESPONDENT**

**JUDGMENT**

4<sup>th</sup> February and 13<sup>th</sup> April 2021

**KISANYA, J.:**

This is an application for revision of the award of the Commission for Mediation and Arbitration for Musoma (henceforth referred to the CMA) in Labour Dispute No. CMA/MUS/43/2017. It is brought by way of a notice of application and chamber summons and supported by an affidavit of Elisha Kagolo, human resources officer of the applicant deposed on 2<sup>nd</sup> August, 2020. The application is opposed by the respondent as per counter- affidavit of his counsel, one Alhaji A. Majogoro.

The background of this matter is that, the respondent was employed by the applicant in the post of Hauling Equipment Operator III. His employment was terminated on 14/2/2017. Prior to termination, he was charged before the Disciplinary Committee for offences of Theft of Company Property, to wit, Gold Bearing Materials (hereinafter referred to as "GBM") and

Committing Dishonesty (See Exhibit D-2). On 8<sup>th</sup> February, 2017, the respondent was found guilty of offences of "Dishonesty theft and Fraud" and "Theft or attempted theft of company property". Basing on the said findings, the respondent was terminated from employment for breach of Company Code of Conduct namely, "Dishonesty theft and Fraud" and "Theft or attempted theft of company property" (Exhibit D-7).

The respondent was dissatisfied with that decision. He instituted Labour Dispute No. CMA/MUS/43/2017 before the CMA challenging the termination.

Three issues were framed for determination as follows:

1. Whether the respondent was terminated without valid reasons.
2. Whether the procedure of terminating the respondent were complied with.
3. To what relief were the parties entitled to.

Two witnesses were called by the applicant to justify the termination. These were Peter Gwambimbi (DW1) and an investigator of the matter one, Enock Ngukah (DW2). The applicant also tendered 9 exhibits to supplement the oral testimony. On the other side, the respondent called no witness apart from himself.

Upon hearing both parties, the CMA held in favour of the respondent. Thus, the termination was held to be unfair substantively and procedurally. In consequence, the applicant was ordered to pay severance pay, payment in lieu of notice and compensation of 20 months' gross salary.

Dissatisfied, the applicant has filed the present application for revision on the following grounds stated in paragraphs 16, 17, 18 and 19 of the affidavit:

- 1. That the Arbitrator erred in ruling that the applicant did not prove fair reason for terminating the respondent's employment.*
- 2. The Arbitrator erred in ruling that the procedure for terminating the respondent's employment were not followed.*
- 3. That the Arbitrator erred in ruling that the chairman of the disciplinary hearing was not impartial.*
- 4. That Arbitrator erred in awarding 20 month salaries to the respondent without justification.*

At the hearing of this application, Messrs. Faustin Mwalongo and Alhaji Majogoro learned advocates appeared for the applicant and respondents, respectively.

Mr. Mwalongo argued the first ground to the effect that it was proved by the applicant on the balance of probabilities that Gold Bearing Materials (GBM) were found in vehicle number 9 which was being operated by the respondent. He faulted the CMA for finding that the GBM were not in open place and that there was a possibility of planting the same. The learned counsel argued that, the fact related to possibility of planting the GBM was not adduced before the CMA. He went on to submit that the respondent ought to have found the said GBM in his vehicle and report the matter. This argument was based on the fact that the respondent adduced to have inspected the vehicle before driving it.

It was also submitted by Mr. Mwalongo that the CMA erred in holding that the GBM were planted by Mr. Thomas because he did not find the same when he inspected or searched the vehicle for the first time. The learned

counsel contended that CMA's decision on that fact was based on speculation in lieu of evidence adduced before it.

Mr. Mwalongo was of the view that the applicant proved that GBM were found in the respondent's vehicle and hence, a valid or fair reason for termination. He pointed out that stealing is an act of dishonest and sufficient reason for termination of employment as held in **Nassoro Khatous Yahya vs Toyota Tanzania Limited**, Revision No. 192 of 2015 (unreported).

In respect of the second and third grounds, Mr. Mwalongo faulted the CMA for holding that the termination was procedurally unfair because the Chairman of the Disciplinary hearing was the respondent's head of department. He argued that the head of department was not barred from participating in the disciplinary hearing because he had not previously handled the matter. Mr. Mwalongo argued further that, since it was not proved that the head of department approved the charges, the Hon. Arbitrator decision and reasons thereto are unfounded. He contended that the applicant did not state in Exhibit D6 that the chairman was biased and that his representative certified the disciplinary hearing to have been conducted fairly. He concluded by submitting that the procedure of terminating the respondent were complied with.

Arguing the fourth ground, Mr. Mwalongo submitted that section 40(1)(c) of the Employment and Labour Relations Act [Cap. 366, R.E. 2019] (the EALRA) sets the minimum compensation of 12 months' salary. He was of the view that the Arbitrator is duty bound to give reasons of awarding compensation over and above 12 months' salary. Citing the case **Sodetra (SPRL) Ltd vs Njelu Mezza and Another**, Labour Revision No. 2007 (unreported), Mr. Mwalongo urged the Court to reduce the compensation in

the event it is found that the termination was substantively and procedural unfair.

That said, the learned counsel implored the court to quash and set aside the award of the CMA.

In response to the last ground, Mr. Majogoro submitted that the arbitrator did not breach the law. He argued that section 40(1)(c) of the EALRA gives the arbitrator discretionary power of awarding compensation of not less 12 months' salary. He supported his argument by citing the case of **North Mara Gold Mine Ltd vs Khalid Abdallah Salum**, Labour Revision No. 25 of 2019, HCT at Musoma (unreported).

In relation to the procedure for termination, Mr. Majogoro submitted that the respondent adduced how he objected participation of the chairman of the disciplinary committee in hearing case which led to his termination. He argued further that the said evidence was not challenged by the applicant during cross-examination. Mr. Majogoro went on to contend that the practice demands the head of charge to approve the charge. Therefore, he was of the view that, the chairman was disqualified from taking part in the disciplinary hearing. He urged me to consider the case of **North Mara Gold Mine Ltd vs Nicholas Mashoba**, Labour Revision No. 25 of 2019, HCT at Musoma (unreported) where it was held that the Chairman must not have been involved in the matter before him.

As regards the reasons for termination, Mr. Majogoro conceded that the respondent was duty bound to prove on the balance of probabilities that the reason for termination was valid/fair. He argued that the alleged offences of theft were not proved as the certificate or evidence to value of GBM

alleged to have been stolen was not stated. He went on to submit that Thomas Branklin who conducted the search or inspection did not give evidence before the disciplinary committee or CMA. Mr. Mwalongo argued that the Court is required to draw an adverse inference against the applicant who failed to call the key witness. He supported his argument by citing the cases of **Mashomba Dotto @ Lukupanika vs R**, Criminal Appeal No. 337 of 2013 (unreported) and **CRDB Bank Plc vs Africhik Harchers Ltd and 2 others**, Commercial Case No. 97 of 2014 HCT, Commercial Division (unreported).

Mr. Majogoro submitted further that, the reasons for termination were required to be proved by Mr. Thomas. He submitted that Amos Lugutu who was called before the Disciplinary Committee supports the CMA's findings that the said Thomas breached the procedure for conducting search. Mr. Majogoro pointed out that there was a time when respondent could not see Thomas searching the vehicle. He also submitted that Thomas was not searched before inspecting the respondents' vehicle. The learned counsel was of the view that the irregularities in searching the respondent raise doubt on whether the alleged GBM were found in the respondent's vehicle. He submitted further that the offences were not proved before the Committee and that CMA.

In view of the above, Mr. Majogoro asked me to uphold the CMA's award and dismiss the application for want of merit.

In his rejoinder, Mr. Mwalongo argued that the discretion of awarding compensation is required to be exercised judiciously, among others, by giving reasons. He contended that the case of **Khalid Salum** (supra) is

distinguishable from the circumstances of this case on the ground that the CMA had issued reasons for its decision.

As regard the procedure for termination, Mr. Mwalongo submitted that the reason for objecting the chairman of the disciplinary committee were not given and reflected in the proceedings of the disciplinary hearing. He also submitted that there is no practice that demands the head of department to approve the charges against an employee.

In relation to the reasons for termination, Mr. Mwalongo reiterated his submission that the applicant proved on the balance of probabilities that the GBM were found in the respondent's vehicle. He was of the view that there was no need of tendering certificate of value GBM or searching Mr. Thomas before inspecting the respondent's vehicle. He submitted further that there was no need of calling Mr. Thomas because the respondent did not dispute that GBM were found in his vehicle and that the said Thomas was no longer working with applicant.

Having examined the record, application, submissions by the counsel for the parties and the law, the issue is whether this application is meritorious.

The first, second and third grounds call us to determine whether the respondent's termination from employment was substantively and procedurally fair. These ground are based on section 37 of the EALRA which provides that termination of employment should be fair. According to that provision, the termination becomes unfair if the validity and fairness of the reason for termination and/or fairness of the procedure used in terminating the employee cannot be proved by the employer. As far as fair reason is concerned, the employer may prove reason related to employee's conduct,

capacity or compatibly or reason based on his/her operational requirements as employer.

Parties do not dispute that the respondent's termination from employment was based on his conduct. It is also not disputed that the respondent was found guilty of the said offences of "Dishonesty theft and Fraud" and "Theft or attempted theft of company property". However, in terms of the charge sheet (Exhibit D-2), the respondent was alleged to have committed the offences of theft of company property and dishonesty when the vehicle being driven was found with GBM. The question then is whether the said offences were proved against the respondent for the Court to hold that the reason for termination was fair or valid?

As stated herein the burden to prove that the reason for termination is fair lies on the employer. I agree with the counsel for the applicant that, this being a civil case, the employer's duty to prove fairness or of the reason for termination is on the balance of probabilities.

The CMA held that the applicant had failed to prove that the reason for termination was fair or valid. The Hon. Arbitrator's reasoned that there was a possibility that the GBM found in the respondent's vehicle were planted by Mr. Thomas who inspected the said vehicle. That reasoning was premised on the following grounds that: Mr. Thomas did not find the GBM when he inspected the vehicle for the first time; the GBM were not at an open area; and the vehicle was being used by more than one person.

I agree with Mr. Mwalongo that the Hon. Arbitrator erred in finding that the GBM might have been planted by Mr. Thomas. This is because such evidence was not adduced by any witness. Also, it is not mandatory that an offender



must be found with item subject to the offence upon being searched for the first time. Finding of the item related to the offence at the time of searching the suspect depends on the circumstances of each case. If the item is found during the second or third time of inspection, it does not mean that the said item was fixed by another person. Therefore, the CMA's finding calls for evidence which is wanting. Be as it may, the question is still the same. Did the applicant prove the offences preferred against the respondent?

As hinted earlier, the offences subject to this matter are stealing the company property and dishonesty. The vehicle driven by the respondent was alleged to have been searched and found in possession of GBM. The respondent did not dispute that the said vehicle was searched and the GBM found therein. However, he disputed to have put or hide the said GBM. He also questioned the procedures employed in searching the vehicle by claiming that, he was not able to see clearly when one, Mr. Thomas was inspecting the vehicle.

The two witnesses called by the applicant, admitted that the search was conducted by Mr. Thomas. It follows that Mr. Thomas was the sole witness to testify on how the GBM was found in respondent's vehicle. However, he was neither called before the disciplinary committee nor the CMA. Further, the CMA was not informed of his whereabouts. In the circumstances, I agree with Mr. Majogoro that the Court is inclined to draw an adverse inference against the applicant who failed to call him before the CMA. I have noted that, the disciplinary committee was informed that, the said Mr. Thomas had resigned from working with the applicant. In my view, that was not a reason for not calling him. He was still a competent witness to testify before the CMA.

In the absence of evidence of Mr. Thomas, there is no other witnesses who testified how the GBM were found in the respondent's vehicle. It is clear that evidence adduced by DW1 and DW2 on the issue at hand was based on information given to them by Mr. Thomas. Further, during the disciplinary hearing, the applicant stated that the fact as to how the GBM were found in the respondent's vehicle would be proved by one, Amos Lugutu who was working with Mr. Thomas on the material day. Yet again, the said Amos Lugutu was not called before the CMA. Looking at his evidence before the disciplinary committee where he testified as PW3, Amos Lugutu, admitted that the respondent's vehicle was searched by Mr. Thomas alone. He also deposed that the searching procedures were not complied with by Mr. Thomas.

In view of the above, I find that the offences preferred against the respondent were not proved. Consequently, the reasons for termination was not valid because the said conducts or offences were not proved.

The next issue is whether the procedure for terminating the respondent was fair. One of the principles of natural justice bars a person to be a judge of his own case. This principle is enshrined in article 13 (6) (b) of the Constitution of the United Republic of Tanzania, 1977 which provides for the right to fair hearing. Any proceedings conducted in breach of the right to fair hearing including, being heard by a person having interest in the outcome of the matter is a nullity for breaching the principle of natural justice.

In the instant case, the CMA held that the procedure for terminating the respondent was unfair because the Chairman of the disciplinary committee

was the respondent's head of department. The extract part of the CMA's decision is reproduced hereunder:

*...kwa mujibu wa ushahidi ni kwamba mkuu wa idara huyo ndio akawa mwenyekiti wa kikao cha nidhamu. Kwa mazingira hayo ni kwamba Mwenyekiti huyo ambaye pia ndio mkuu wa idara alikuwa ni muhusika katika kupelekea shauri hilo la nidhamu na aliingia kwenye kikao hicho tayari akiwa na majibu tayari kutokana na kuamuru kwamba mlalamikaji apelekwe kwenye kikao cha nidhamu."*

I have gone through the evidence on record and I found no mention of the chairman being the respondent's head of department. In his evidence, the respondent stated the complainant and chairman were coming from his department. This is what was deposed by the respondent:

*"...mlamikaji alikuwa anatoka katika idara yangu M/kiti alikuwa anatoka katika idara yangu. Mwakilishi wangu aliweka pingamiz kwa kutokuwa na Imani na M/kiti. Hawakukubali."*

The above finding implies that the CMA's decision that the chairman was the respondent's head of department is not supported by an evidence. Page 3 of the Disciplinary Hearing Evidence (Exhibit DE6) shows that the disciplinary hearing was presided over by Msafiri William. No evidence was given before the CMA to prove that the said Msafiri William or the person chairman referred to by the respondent was at one point in time involved in approving the charges against the respondent. Furthermore, the applicant's procedure of charging an employee before disciplinary hearing was not

adduced in evidence. Therefore, the Hon. Arbitrator invented his own facts in arriving at the said decision. For that reason, I find merit in this ground.

The last issue relates to legality of compensation of 20 months' salary awarded by the CMA. I am at one with the learned counsel for both parties that upon finding that the respondent was terminated unfairly, the Arbitrator has a discretionary power of awarding compensation of not less than 12 months' salary. This is pursuant to section 40(1)(c) of the EALRA. I also agree with Mr. Mwalongo that such discretion should be exercised judiciously by giving the reasons.

In this case, the reasons were stated at page 7 and 8 of the award. The Hon. Arbitrator considered that the termination was procedural and substantively unfair. He also considered the circumstances of the case. This is reflected at page 7 and 8 where it was held that:

*"Fidia hii ni kutokana kutokuwa na sababu ya msingi ya kusitisha ajira ya mlalamikaji na ukiukwaji wa taratibu za kusitisha....."*

*..Kwa mtizamo wangu na mazingira halisi ya mgorogro huu fidia hii itakuwa sahihi na haki..."*

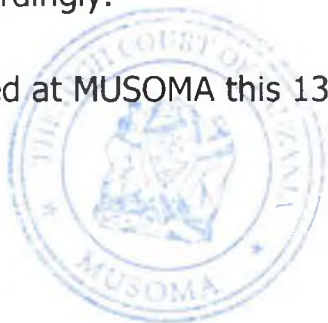
Now, the circumstances of the case were to the effect that the respondent had prayed for reinstatement. The Arbitrator was of the view that grant of award of reinstatement would be improper because the respondent had been out of work for almost three years.

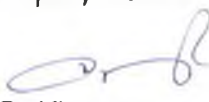
In view of what I have decided while addressing the second ground, the factor that the termination was procedural unfair cannot be a considered in

awarding compensation of more than 12 months. However, I have also considered that the respondent had prayed for re-instatement. In that regard, had the relief for re-instatement granted, the respondent would have been paid salary during the period of three years (36 months) that he was absent from work due to the unfair termination, as provided for under section 40(1)(a) of the EALRA. Therefore, I find no reason to disturb the compensation of 20 months' salary awarded by the CMA and not challenged by the respondent.

For the foregoing, the application is partly allowed. The CMA's finding that the respondent's termination from employment was procedural unfair is hereby quashed and set aside. Other CMA's findings and orders are hereby confirmed but, for the reason stated herein. An aggrieved party is entitled to appeal to the Court of Appeal in accordance with the law. Order accordingly.


Dated at MUSOMA this 13<sup>th</sup> day of April, 2021.



  
E. S. Kisanya  
JUDGE

Court: Judgment delivered through video link this 13<sup>th</sup> April, 2021 in appearance of Mr. Imani Mfuru, learned advocate for the applicant and holding brief for Mr. Alihaji Majogoro, learned advocate for the respondent.



  
E.S. Kisanya  
JUDGE  
13/04/2021