IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CONSOLIDATED LABOUR REVISION APPLICATIONS NO. 11 AND 16 OF 2019

(Originating from CMA/ARS/ARB/234/2016)

DAVID KITANGOI OLAIS.....1ST APPLICANT/1ST RESPONDENT

FREDRICK CHARLES BARAKA.....2ND APPLICANT/2ND RESPONDENT

VERSUS

HAPPY SAUSAGES LIMITED.....RESPONDENT/APPLICANT

JUDGMENT

21/12/2020 & 08/01/2021

GWAE, J

This is a judgment from consolidated applications in respect of two Revision Applications filed in this court where Revision Application No. 11 of 2019 was filed by the employees above and Revision Application No. 16 of 2019 was filed by the employer herein. The two applications were filed separately however in the course of hearing, the two applications were consolidated.

The two applications arouse out of the following context; the 1st and 2nd applicant (herein 1st employee and 2nd employee respectively) above were employed by the respondent/applicant (employer hereinafter) on different dates

and time however their employment relationship went sour and on the 15th August 2016 the employees were terminated from their employment for alleged reasons of enrichment through electronic fiscal device (EFD Machine) "Kujinufaisha kupitia mashine ya kodi ya EFD kwa kuwatoza bei kubwa wateja na kujitwalia ongezeko la fedha iliyopatikana." Aggrieved by the employer's decision, the employees referred their complaints to the Commission for Mediation and Arbitration of Arusha at Arusha (CMA) claiming that they had been unfairly terminated.

The CMA findings were to the effect that, the employees were substantively terminated fairly but they were procedurally unfairly terminated and the CMA further ordered that the employees to be paid **ten (10)** months' compensation and other terminal benefits. This decision aggrieved both parties who are now seeking revision of the CMA award. The employees were under the legal services of **Mr. Asubuhi John Yoyo** and **Mr. Nelson S. Merinyo** Advocate for the employer.

In Application for Revision No. 11 of 2019, the employees raised three (3) grounds of revision while in Revision No. 16 of 2019 the employer raised five (5) grounds of revision. However, in the course of composing this judgment, the raised grounds of revision by the parties are summarized and the following grounds will guide me in my determination of this matter;

i. Whether or not the Arbitrator's findings with effect that, the employees' termination was for valid reasons is justifiable in law.

ii. Whether or not the Arbitrator's findings that the employees' termination was procedurally unfair is justifiable in law.

iii. Whether or not the award of 10 months compensation and other terminal benefits awarded by the Arbitrator are justifiable in law.

The parties' applications for Revision were disposed of by way of written submissions, sincerely, I commend both counsel for their industrious submissions and authorities which I had an opportunity to carefully go through now. It suffices to say that all submissions shall be considered and be given the weight they deserve.

I shall now start with the **first issue,** as to whether the employees' termination was for valid reasons. It is very clear under Section 37 (2) (a) of the Employment and Labour Relation Act Cap 366 R.E 2019 that, the termination of an employee shall be unfair if the employer shall fail to prove that the termination was on valid reasons.

It is evident from the records, in particular on the termination letters that the employees were terminated for alleged reasons of "kujinufaisha kupitia uchakachuaji kutumia mashine ya kodi ya EFD kwa kuwatoza bei kubwa wateja na kujitwalia ongezeko la fedha iliyopatikana." The evidence leading to the

termination of the employees were that the employees who appeared to have been sales officers as per their employment's contracts on different dates and occasions overcharged the employer's customers beyond the actual selling price fixed by the employer. According to PW1, Kessy Juma, the Finance and Administration Manager, the employees were in the sales department who would distribute products to the customers and subsequently issue them with the EFD receipts. PW1's testimony was further that when a product is sold there would be two receipts issued, one is a cash book receipt and another one is the EFD receipt, according to him the amounts on the two receipts appeared to be different where the amount on the EFD receipt shows that the customers were overcharged compared to the amount on the cash book receipt which reflected the actual selling price.

The PW1's evidence was supported by exhibit P4 and exhibit P5 the cash book receipts and the EFD receipts respectively which were issued by the 1st employee and Exhibit P12 and Exhibit P 13 the cash book receipts and the EFD receipts respectively issued by the 2nd employee. To substantiate this, the witness made a comparison between Exhibit P4 where 20 pieces of the Beef Vienna was sold at 4720/= being the actual price for each piece while in exhibit P5 the same product was charged at 5192/= each.

From the evidence above it is with no doubt that the selling price on the EFD receipts is higher than the amount charged on the cash book receipts, thus it is apparent that there was overcharging of the employer's products beyond the fixed price.

Having established that the employer's products were overcharged beyond the actual selling price the next question that follows in order to establish that there were valid reasons for the termination of the employees is whether the employees were the perpetrators/wrong doers of the said offence. The records of the CMA are very clear and a number of exhibits which were tendered and admitted by the Commission, I shall consider them as follows;

PW1 when testifying, established that the employees were in the sales department and on the material dates where the alleged offence of overcharging is said to have been committed the EFD machines where in possession/use by the employees. The employer had three EFD machines one is said to be fixed at the desk top and the other two are mobile EFD machines which were used by sales officers. PW2, Stella Kasmir Mtei who introduced herself as a store keeper-dry products store and stationery store stated that usually when a person takes materials from the store, he/she will have to sign in the dispatch book. According to her the dispatch book entry for the date 29/06/2016 shows that the EFD machine 02TZ10004 was handled to the 2nd employee and he wrote his name on

the entry and signed thereof, the fact which is supported by exhibit P17 dated 29th June 2019 which I also had a look at and found it to be credible. This witness went on testifying that on 07/05/2016 the 2nd employee was given a receipt book and the handing over of the said receipt book was supported by exhibit P16.

I have noted that both the electronic receipts and the cash book receipts do not bear signatures of the employees to substantiate that they were the ones who issued the said receipts however this lacuna on my view does not vitiate the fact already established and exhibited that the employees were in possession of the EFD machines and the cash book, and by virtual of being salesmen justifies the fact that the receipts were issued by them.

There is further evidence on the part of the 1st employee to have once committed the same offence of overcharging the customers, and at the time this offence was committed the 1st employee was still paying the amount he was indebted by the employer. This fact is supported by exhibits P6 and P7 which is the former is the letter written by the 1st employee acknowledging the debt of **Tshs. 3,978,170/=**and requesting to repay the debt through his salary deductions and the latter is the letter by the employer requiring the 1st employee to repay back the money he obtained by illegal means or so called "kuchakachua na kujitwalia fedha taslim Tshs. 3,978,170/=". With this evidence I am fully

convinced just like the trial Arbitrator that the employees must have tempered with the Cash book receipts and the EFD machines to overcharge the employer's customers.

The employees' counsel submitted that there ought to have been evidence from any of the employer's customers complaining or supporting the fact that the employees were overcharging them, indeed, there was no any evidence from the customers complaining to the effect, however in the absence of complaints from the customers in itself does not exclude or exonerate the employees from committing the offence as there is enough evidence to support the allegations.

The 1st employee when justifying his complaint before the Commission testified that he was terminated while working as a supplier and not as a salesman. According to him he was orally transferred from the sales officer to supplier by PW1. Basically the 1st employee is suggesting that at the time the offence was committed he was no longer involved in the selling of the employer's products but rather supplying. Despite lack of evidence to substantiate his shift of working position the 1st employee on cross examination when asked on the relationship between sales and marketing, he stated that they are proportion and that a salesman and a person with marketing profession can perform both duties.

He further contended that he accepted to repay back the money to the 1st employee on fear that he would lose his job, this fact is very absurd for a person to agree his salary deductions for almost two years to pay this huge amount of money for something which he has not done only on the reason that he fears to lose his job.

The 2nd employee, on the other hand alleged to have misunderstandings with PW1 who promised to terminate his employment contract, he claimed to have witnesses who witnessed the threats by PW1 to terminate his employment contract. The 2nd employee also alleged that on 29/6/2016 he did not have the EFD machine as he was doing promotion at NAKUMAT and there were witnesses to that effect. However, in all these incidences the 2nd employee did not bring any witness to back up his story or any documentary evidence.

Turning on the **second issue** whether or not the arbitrator's findings that the employees' termination was procedurally unfair is justifiable in law. The established principle under section 37 (2) (c) of the ELRA is that no termination is permissible in law if it does not follow fair procedures. The arbitrator's findings on this issue is grounded from the evidence on record in particular that of PW1 and PW2 who admitted that no investigation was conducted, further to that the disciplinary committee was chaired by an incompetent person who was not a senior manager as per the requirement of Rule 4 of the Employment and Labour

Relations (Code of Good Practice (code) GN No. 42, Guidelines for Disciplinary Hearings, Incapacity and Incompatibility Policy and Procedures.

On the first limb of the second issue, the records do not support the fact that investigation was conducted, PW1 and PW2 admitted in their testimonies that investigation was not conducted. Even though there were letters written by the employer informing the employees that their employment was suspended pending investigation, the letters were admitted and marked as P3. I wish to quote part of the letter;

> "kwa sasa upelelezi unaendelea na baada ya kukamilika kwa upelelezi huo kampuni itachukua hatua stahiki"

With this kind of information, it is prudently expected that, if indeed the employer suspended the employees pending investigation on the alleged misconducts, the employer ought to have made investigation and prepared an investigation report and perhaps give it to the employees to enable them prepare themselves with their defence. Actually, I don't buy the version of the employer's counsel that with the suspension letters it was enough to prove that investigation was conducted.

In the absence of an investigation report and above all the employer's representatives have patently admitted to have not conducted the same, I am therefore compelled to hold that, a mere suspension letter pending investigation

does not amount to investigation required by the law. I have also considered the nature of the offence, the employees were alleged to have committed, it is a serious one that needs a thorough investigation.

I have also noted that the employees complained of the capacity of the chairman of the disciplinary hearing committee by stating that he was not a senior manager, however going by the records it was established that the senior Managers who were Mr. Juma Kessy and Mosses Wahome could not have acted as chairman as they were involved in the allegations which gave rise to the disciplinary hearing. Therefore, they would not have been impartial. Perhaps it is just and fair to reproduce Rule 4 of the Code (supra) for necessary guidance;

> "4 (1) Senior Manager should be appointed as chairperson to convene a disciplinary hearing in the event of
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> a. Further misconduct following a written warning or warnings
> b. Repeated written warnings for different offences or
> c. Allegation of serious misconducts such as those referred to the rules relating to termination of employment and which could on their own justify a final warning or dismissal
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> (2) The chairperson of the hearing should be impartial and should not if possible have been involved in the issues giving rise to the hearing. In appropriate circumstance a

senior manage from different office may serve as a chairperson (emphasis mine)"

In our dispute, the alleged overcharging to the employer's customers by the employees, amounts to an offence of stealing which is a gross misconduct (See Rule 12 (3) of the Code-GN. 42 of 2007). Hence a senior manager was necessary to be appointed to convene the Disciplinary Hearing instead of Mr. Laibon who was not a senior manager but a mere Technician. In the premises the employer was to hire a senior manager from another office. How can a disciplinary hearing against a superior officer be chaired by junior officer? The answer is not in affirmative

I also wish to comment on a complaint raised by the employees that they were terminated without being given right to be heard (defend) however the two employees admitted on the notice for hearing that was conducted on 2nd July 2016 on which hearing was adjourned and that there was no any other hearing meeting that was communicated to them. I have gone through the minutes of the meetings that were held on different dates as follows; on the 2nd July 2016, the employees admitted to have been notified of the meeting and according to the minutes the first employee signed establishing his presence in the meeting, another meeting was held on 09/07/2016 where the employees' names were on the minute sheet however it was only the first employee who signed whereas the 2nd employee refused to sign the notice. This meeting was adjourned to

14/07/2016 where again the 1st employee signed and his name is depicted on the minute sheet and another meeting was on 03/08/2016 where the 1st employee attended and his signature appears on the minute sheet. Exhibit P11 is the notice to attend the disciplinary hearing on it is indicated that the 2nd employee denied the notice and there were witnesses to that effect.

Following the above series of events, I am totally convinced that the employees were accorded with the right to be heard by the fact that they were both notified of the disciplinary hearing meeting and as evidenced by the records the 1st employee appeared in the said meetings while the 2nd employee for reasons best known to himself denied to appear. It should be understood that the right to be heard is available only when an employee is served with notice to appear on a specified date (s) but not for one who refuses to appear. (See the case of **Mathias Petro vs. Jandu Construction & Plumbers,** Revision Application No. 175 of 2014, Reported in the Labour Court Cases Digest of 2015)

Nevertheless, it is doubtful if procedures were followed in order for the termination to be fair. In my view. failure to conduct investigation by the employer while she initially suspended her employees pending investigation which he did not conduct and her failure to hire a senior manager to chair the disciplinary hearing committee against the employees. Therefore, I am of the

same holding as that of the arbitrator that the employees' termination was procedurally unfair.

I shall now turn to the **last issue** as to whether or not the award of 10 months compensation and other terminal benefits awarded by the Arbitrator are justifiable in law. The law under section 40 (1) (c) of the ELRA is very clear that where the court finds that termination is unfair may order for compensation to the employee of not less than twelve months remuneration, in our case the arbitrator's correct award is that the employees should be compensated for ten months remuneration less than what the law has provided and with no reasons justifying the order.

I must admit the award of compensation of not less than 12 months' salary is not and intendment of the legislature, perhaps the trial arbitrator had genuine reasons for giving such an order but it was more prudent to have given reason (s) for his departure from the clear provisions of the law than to merely give orders contrary to what the law provides.

The trial arbitrator went further to give orders as to the terminal benefits as appearing on exhibits P1 and P10 in case they were not paid, I think there is no fault with this order taking into account the same was not established on hearing as to whether the employees had been paid their terminal benefits as

stipulated in their letters of termination. Therefore, the arbitrator was correct to have ordered as he did.

Further to that, I also noted that the 1st employee's employment contract was renewed for a further five years, and it was to end 31st March 2020 while his termination was on 15th August 2016. It is the position of the law that where the employer terminates an employee whose contract of employment has not come to an end such an employee required to be paid compensation for the remaining period of the contract. In **Good Samarita vs. Joseph Robert Savari Munthu,** Revision No. 165 of 2011 (unreported), this court held;

> "When an employer terminates a fixed term contract, the loss of salary by the employer of the **remaining period of the unexpired term is a direct foreseeable and reasonable consequence of the employer's wrongful action.** Therefore, in this case, probable consequence of the employment contract was 21 months. To that extent ... My decision would have been different if there was evidence that the direct loss had been litigated by the respondent taking up as alternative employment (emphasis supplied)".

In our instant case, the remaining period of the 1st employee's service is about four years and considering the fact that there was valid for the termination, I am of the view that it is not fair and economic viable to order

compensation in his favour for the remaining period. Hence in the circumstances, the decision in the case of **Samarita** (supra) is distinguishable**.**

In the end result, following the findings of this court that the employees were fairly terminated substantively but procedurally were unfairly terminated thus they are entitled to twelve (12) months' salary compensation together with the payments of terminal benefits as per their respective letters of termination if not paid to date.

It is ordered.

M. R. GWAE
JUDGE
08/01/2021