IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY)

AT ARUSHA

LABOUR REVISION NO. 51 OF 2019

(Original CMA/ARS/ARB/266/2017)

EQUITY BANK TANZANIA LIMITED.....APPLICANT

Versus

SIGFRIDA LUKAS MWANANA ..... RESPONDENT

JUDGMENT

12/4/2021 & 28/06/2021

GWAE, J

Through the applicant's chamber summons, I am asked to revise the proceedings, award and decision of the Commission for Mediation and Arbitration of Arusha at Arusha and quash the award on the ground that it is fraught with illegalities and errors on the face of it.

Facts giving rise to this labour dispute can be recapitulated as follows; that, the respondent, Sigrifida Lukas Mwanana was employed by the applicant, Equity Bank Tanzanian Limited since 1st March 2011. The respondent was recruited in Moshi but came to be transferred to Arusha and prior to termination she was working with the applicant as Operations Manager/Relations Manager at Arusha Branch however on the 31st March 2017 her employment was terminated, her dispute was condoned. Through the referral Form No.1, the respondent

sought compensation for unfair termination of not less than 60 months' salary, leave and overtime as well as other dues as per labour laws.

It is also revealed from the CMA record that, before termination, the respondent was accused of theft and forgery offences, arrested on 13th March 2017 and that on the 15th July 2017 she was arraigned together with three others in the Resident Magistrate's Court of Arusha at Arusha.

Upon hearing the parties, the Commission found that the termination of the respondent's employment was for valid reason notably; gross negligence as admitted by the respondent however it was the finding of the learned Arbitrator that, there were procedural irregularities resulting to unfair termination to wit; failure to determine the respondent's appeal to the Appellate Board, termination of the respondent while there was pendency of a criminal charge against her at police, thus violating section 37 (5) of the Employment and Labour Relations, Act Cap 366 R.E, 2019 (ELRA), that, the disciplinary hearing committee was bias as the same was chaired by one Jackline Minja who was HR and also the one who initiated disciplinary actions against the respondent, failure to timely notify the respondent of the disciplinary hearing committee outcome within five (5) working days as the disciplinary proceedings were held on the 28th March 2017 while the respondent was notified of the outcome on the 8th April 2017.

Consequently, the Commission awarded the respondent, twelve (12) months' salary compensation (Tshs. 12 x 1,750,000/=21,000,000/= and

repatriation allowance from the date of termination to the date of delivery of the award as stipulated under section 43 ((3) of ELRA and Rule 16 of GN. 47 of 2017 (27 months' repatriation expenses 1,750, 000/=47,250,000/=). Making a total of Tshs. 68,250,000/=.

Aggrieved by the CMA award, the applicant filed this application for revision by advancing a long list of legal issues however there are only three main legal issues;

1. Whether the arbitrator erred by holding that the respondent was terminated while facing criminal charges
2. Whether arbitrator erred in law by holding that the Disciplinary Hearing Committee was bias
3. Whether the arbitrator misconducted by holding that the respondent was entitled to 12 months' compensation and repatriation expenses for 27 months at monthly rate of Tshs. 1, 750,000/=

On the other hand, the respondent seriously opposed this application via her counter affidavit by stating that the impugned award was correctly procured by the Commission.

Messrs. Edwin Lyaro and Mr. Emmanuel Shio who appeared before me on 22nd February 2021 representing the applicant and respondent respectively

sought and obtained leave of the court to dispose this application by way of written submission. Parties' written submissions were accordingly filed in court and I will consider the same while determining the applicants' grounds for the sought revision.

As to the **1st issue above**, the applicant attempted to convince the court that it was wrong for the arbitrator to hold that it was wrong to terminate the respondent while she was facing a criminal charge by arguing that the applicant reported the matter to police in order to obtain loss report which enabled her to be indemnified and that the respondent was arraigned after she had already been terminated. Whereas the respondent's counsel argued that the Commission was justified to hold that the applicant violated section 37 (5) of ELRA as she terminated the respondent's employment while there was a criminal charge that was yet determined. He referred this court to a decision of this court (**Karua, J)** in the case of **Stella Manyah and another vs. Shirika la Posta** Labour Div. Reference No. 2 of 2010 reported in Labour Court Digest 2013.

In order to be in a safer position in determining the 1st legal issue, it is pertinent to have section 37 (5) of ELRA reproduced herein under;

> "37 (5) No disciplinary action in form of penalty, termination or dismissal shall lie upon an employee who has been charged with a criminal offence which is substantially the same until final determination by the Court and any appeal thereat"

Looking at the provision of the law quoted herein above, a termination of employment is prohibited while an employee is facing a criminal charge before a court of law. In our case it is plainly established that the respondent was arraigned in the RM's Court on the 15th July 2017 while her employment was terminated on the 31st March 2017. Hence, there was no formal charge against the respondent before any court of law however there were criminal accusations against respondent which were already reported to police as rightly argued by both advocates. Mere criminal accusation to police, to my view, does not bar an employer from terminating her employee. In our present case, it seems that, the respondent was apprehended, bailed out and there was investigation that was being carried out that is why the respondent was eventually arraigned to the RM's Court with the offence of theft and forgery. Had the applicant caused the accusations against the respondent to be closed by police and no further action preferred against the respondent, there could not be any violation of section 37 (5) of ELRA.

According to the above finding, I subscribe the decision of my fellow judge in the case of **Stella Manyah and another vs. Shirika la Posta** (supra) as was correctly applied by the learned arbitrator as the applicant undisputedly accused the respondent and reported the accusations to police who mounted an investigation and eventually the respondent was charged with offences in the

court of law. I think, the act of the applicant of terminating the respondent while investigation was being carried out, was premature one unless the police case was closed demonstrating that no further criminal action would be taken against the respondent. It is my firm view that section 37 (5) of the Act should be broadly interpreted and not narrowly as wrongly argued by the applicant's counsel. Having said so this ground is thus dismissed.

In the **2nd ground,** the counsel for the applicant has not added any material arguments in respect of this ground whereas the respondent's cemented that one J. Minja-HR was not a competent person to chair the disciplinary Hearing Committee since she was the one who, charged the respondent and summoned the respondent and eventually issued a termination letter. I wholly agree with the holding of the arbitrator and arguments advanced by the respondent's counsel that the said Minja was not impartial for very obvious reason that, she was a complainant and at the same time judge /chairperson. She could not therefore be impartial in anyhow. The acts of the said Minja of playing a role of prosecutor/complainant and chairperson/judge would not guarantee rule against bias which is among fundamental principles of natural justice, particularly a right to a fair hearing. I am guided by Rule 13 (4) of the Employment and Labour Relations (Code of Good Practice), Rules, GN. 42 of 2007 which I reproduce herein under;

> "R.13 (4) The hearing shall be heard and finalized within a reasonable time and chaired by sufficiently senior management, representative who shall not have been involved in the circumstances giving rise to the case"

According to the above rule, there is a clear prohibition of a junior officer to chair a disciplinary hearing and requirement of a senior officer who has not taken involvement in some steps towards an employee who is charged with disciplinary misconducts as no one who is permitted to be a judge of his own cause as he may have an interest to save.

Basing on the discussions above as well as other violation of termination procedures such as right to be given an outcome result of the disciplinary committee within prescribed period and right to have an appeal heard and determined as well as be given appeal result. The learned arbitrator was therefore justified to hold that, the respondent's termination of employment was procedurally unfair. Having found as herein, this ground for revision so sought is also dismissed.

Regarding the 3rd ground, whether the arbitrator misconducted by holding that the respondent was entitled to 12 months' compensation and repatriation expenses for 27 months' salary at monthly rate of Tshs. 1,750,000/=. It is the submission of the applicant's advocate that the arbitrator was not justified to order compensation after she had found that there was a valid reason for the

termination and that, it was improper to award repatriation allowance since the same was not prayed nor was it argued by the parties. According to section 40 (1) of the Act, when termination is found to be unfair by an arbitrator or a judge of the court, an employee may be reinstated or re-engaged or be paid compensation of not less than 12 months' salary but such compensation shall be in addition to other benefits due to the employee and should not therefore operate as substitute. For the sake of easy reference, section 40 (1) of the ELRA is reproduced;

> "40 (1) Where an arbitrator or Labour Court finds a termination is unfair, the arbitrator or Court may order the employer
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> (a) to reinstate the employee from the date the employee was terminated without loss of remuneration during the period that the employee was absent from work due to the unfair termination; or
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> (b) to re-engage the employee on any terms that the arbitrator or Court may decide; or
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> (c) to pay compensation to the employee of not less than twelve months remuneration.
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> (2) An order for compensation made under this section shall be in addition to, and not a substitute for, any other amount to which the employee may be entitled in terms of any law or agreement".

Basing on the above statutory provisions of the law, the arbitrator or judge may order an employer to do one of the above as remedies available in favour of an employee when a termination is found unfair. The termination may be unfair either for both reason and procedure or for only reason or procedure (See section 37 (2) (a) & (c) of the Act. Thus, to hold that the arbitrator would not award 12 months' salary compensation as she found the termination was for valid reason is not backed by the above statutory provisions.

More so, the awarded compensation of 12 months' compensation is the minimum one as the law is very clear that the compensation should not be less than twelve months' remuneration. An order as to compensation may only be ordered less than 12 months' salary under exceptional circumstances. Thus, the arbitrator was entitled to exercise her statutory discretion in awarding 12 or more months' salary compensation. I can therefore differ from the finding in **ELCT North Western Diocese v. Edward Mugurubi** (2013) HCLCD 149 where it was held that the whole amount (12 months' salary compensation is grantable where termination is found to be both substantively and procedurally unfair). My reason is that the twelve months' salary compensation is the least amount that is awardable whenever the termination of an employment is found to be unfair in terms of substantive and procedural ground. It follows therefore, when termination is found to be unfair in both substantive and procedural ground, compensation can be even more than 12 months.

As to the order of payment of the repatriation allowance, I have carefully looked at the submission of both sides, it is clear that the applicant's advocate is not alleging that the respondent was not entitled to such relief or that she was not recruited in Moshi save that parties did not address the Commission on that issue and that the same was not pleaded. With due respect with the learned advocate for the applicant, the respondent through her referral indicated that she was praying for other dues as per labour laws. An award including right to repatriation expenses is a right that follows a decision.

I find apposite to subscribe to the holding of this court in **Eddy Martin Nyinyoo vs. Real Security Group and Marine** (20130 HCLD 13, a precedent cited by the applicant's advocate where it was held and I quote;

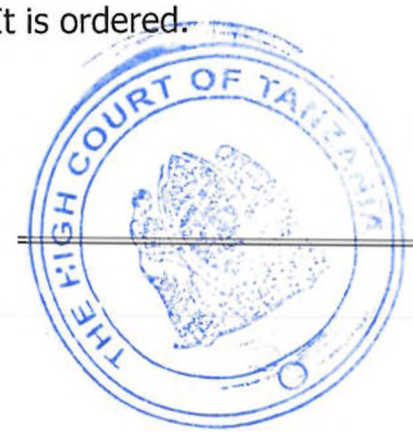
> "The rule stands for the proposition that, an award can be made of rights which in law follow the decision, e.g. in a case of employment termination, an award of severance pay, notice, transport to place of recruitment etc, may be made even if not claimed. That is because the said payments are payable as of right under sections 41, 42 and 43 of Sub-Part F of ***Employment and Labour Relations Act 6/2004.***

The applicant, in my view, if he paid the respondent her terminal benefits including repatriation, he ought to have stated to that effect and attach some documentary evidence establishing either he paid the repatriation expense to the respondent or that he recruited her in Arusha as opposed to the letter of

appointment dated 22nd February 2011 tendered and produced by the applicant (A6). As repatriation allowance is incidental to the award, it follows that, an order as to payment of repatriation was not incorrectly awarded.

Basing on the above discussions, the award of CMA is consequently confirmed. This application is entirely dismissed. Given the fact that, this is the labour matter, each party shall bear its own costs

It is ordered.



M. R. GWAE
JUDGE
28/06/2021