THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
(LABOUR DIVISION)
AT MBEYA
LABOUR REVISION NO. 03 OF 2020
(Originate from Complaint No. CMA/MBY/124/2010)

HUMPHREY NGALAWA.....APPLICANT

VERSUS

COCA COLKWANZA LIMITED.....RESPONDENT

JUDGMENT

Date of last order: *30/11/2020*
Date of Judgment: *17/02/2021*

NDUNGURU, J.

The applicant one, Humphrey Ngalawa seeks to move the Court to exercise its revisional jurisdiction by calling, examining and to revise the proceedings and award of the Commission for Mediation and Arbitration for Mbeya (herein to be referred as CMA) dated the 23rd day of September, 2015 in Labour Dispute No. CMA/MBY/124/2010.

The application is by way of a Notice of Application and chamber summons which are taken out under the provisions of Section 91 (1) (a), (b) and 91 (2) (a), (b) of the Employment and Labour Relations Act, No. 6 of 2004 and Rule 24 (1), 24 (2) (a), (b), (c), (d), (e), and (f) and

Rule 24 (3) (a), (b), (c), and (d) and Rule 28 (1) (c), (d) and (e) of the Labour Court Rules, G.N. No. 106 of 2007.

The application is supported by an affidavit duly sworn by applicant himself. The application is resisted by the respondent through counter affidavit duly sworn by Mr. Mika T. Mbise, the respondent's counsel which was lodged on the 15th day of April, 2020.

Briefly, the facts leading to the institution of the present application is this. The applicant (who was the complainant at the CMA) was employed by the respondent herein on 14th day of December, 1998 as bottle inspector until he was terminated on 18th day of August, 2010 in a position of water treatment operator. The reason for the termination was gross negligence by caused damage to the new water treatment plant.

Also, the record revealed that, the applicant was charged and brought before the respondent's disciplinary committee, where his employment terminated. The applicant was dissatisfied with the respondent's decision and therefore on 26th day of August, 2010 he referred the dispute to the CMA claiming inter alia that his employment was unfair terminated by the respondent. Having heard the evidence adduced by the both parties, the Arbitrator was satisfied that the applicant herein was terminated fairly by the respondent from the

employment. The applicant was aggrieved by the award delivered by the CMA and therefore, lodged the present application before this Court on the following grounds:

(a) The Commission misdirected itself by ignoring the fact that the purported charges leveled against the Applicant were contradictory and unwarranted.

(b) The Commission misdirected itself on law and fact by believing that there was training conducted to the Applicant the fact which is not true.

(c) The Commission misdirected itself by relying on the purported investigation report whereas by doing so ended up blessing the termination the act which amounted to gross injustice to the Applicant.

(d) The Commission misdirected itself by believing that there was a disciplinary hearing despite the fact that there was no proof to such effect.

When the application placed before me for hearing, Mr. Philip Mwakilima, learned advocate appeared for the applicant whereas Mr. Mika T. Mbise, learned advocate appeared for the respondent. By leave of this Court, the application was disposed of by way of written

submissions and I appreciate both parties for adhering the scheduling order of the Court.

Submitting in support of the application, Mr. Mwakilima argued that, the arbitrator was wrong to hold that the termination of the applicant's employment was procedurally and substantively fair. He added that, the employer has duty to prove that the termination of the employment is fair.

The counsel for the applicant relied on Section 37 of the Employment and Labour Relations Act, 2004 and in the case of **Tanzania Railway Limited vs. Mwajuma Said Semkiwa, Revision No. 239 of 2014, High Court (Labour Division) (unreported)** to support his submission. The counsel for the applicant also submitted that, the applicant fault the decision of the CMA on the grounds that the reason for termination was not valid and again the sanction posed by the respondent/employer was not justified.

To reinforce his submission, the counsel for the applicant he cited the case of **Peter D. Nene vs. Chine New Era International Engineering Corporation**, Revision No. 29 of 2013, High Court of Tanzania (Labour Division) at Mbeya (unreported) where this Court defined term misconduct.

He continued to submit that, there is no evidence adduced by the respondent proving that the applicant negligently. He added that, the respondent failed to prove that the applicant had sufficient knowledge to run and to operate the plant and that he acted in a manner which implies that willfully and with bad intention to damage the plant. Also, he stated that, in order for the applicant to be terminated substantively fair, the employer/respondent must prove that by the time the applicant caused the alleged damage to the water treatment plant has knowledge that what he did was unacceptable.

To cement his argument, he cited the Rule 12 (1), (2), and (4) of the Employment and Labour Relations (Code of Good Practice) Rules, 2007 G.N. No. 42 of 2007. Again, Mr. Mwakilima contended that, there is no proof of the previous disciplinary record which was presented before the CMA to support the termination of the applicant.

Also, the learned counsel for the applicant argued that, the sanction of termination from the employment done by the respondent on the ground of misconduct was not justified. He invited this Court to consider the case of **National Microfinance Bank vs. Aizack Amos Mwampupile**, Revision No. 06 of 2013, High Court of Tanzania (Labour Division) at Lindi (unreported) to support his position. In conclusion, he prayed for the Court that this application to be granted as prayed.

In reply, Mr. Mbise commenced his submission by stated that the documents drawn and filed in present application are not better than the ones filed in the three previous applications from the same award. He added that, the Labour Revision No. 18 of 2017 was struck out on 11th day of March, 2020 because it was found offensive of mandatory provisions of the law which it was brought.

Again, Mr. Mbise submitted that, an application must be made through Notice of Application which must contain information stated under Rule 24 (2) (a), (b), (c), (d), (e), and (f) of the Labour Court Rules, 2007 G.N. No. 106 of 2007 as well as Order XIX of the Civil Procedure Code (Cap 33 R.E. 2019). He also cited the case of **Rebeca Daniel William vs. Sandvick Mining Construction Ltd**, Revision No. 10 of 2011, High Court of Tanzania (Labour Division) at Mbeya, **The Chairman Pentecostal Church of Mbeya vs. Gabriel Bisangwa and 4 others**, (DC) Civil Appeal No. 28 of 1999, High Court of Tanzania at Mbeya and **Jestina George Mwakyoma vs. Mbeya-Rukwa Auto parts and Transport Ltd.**, Civil Application No. MBY 7 of 2000, CAT (all unreported) to bolster his argument.

He went on to submit that, the Notice of Application and chamber summons filed by the applicant based on the information from Mr. Mwakilima who did not supply his own affidavit. He added that, the

failure of which the facts deposed in the affidavit are rendered hearsay and in admissible; rendering the present application incompetent and liable to be struck out. To support his submission, he cited the case of **Daudi Constantino vs. Coca Cola Kwanza Ltd.**, Labour Revision No. 28 of 2017, HC (Labour Division) (unreported) to the effect that where affidavit did not contain a statement of material facts, the application will be defective and liable to be struck out.

Responding to the merit of the present application, Mr. Mbise argued that, the written submission filed is more of a cocktail of assumed legal and factual issues not articulated in the affidavit. He added that, the issues listed in paragraph 6 of the applicant's affidavit as legal issues are infact the very factual issues. Also, the counsel for the respondent the said issues they were framed for the parties to adduced evidence before CMA.

Again, Mr. Mbise submitted that, they cannot be raised as legal issues at this stage because the legal issues must arise from the record of proceedings and award of CMA. He went on to submit that, the argument that the applicant acted without wrong intention on what he did, was rejected by arbitrator on sound reasons found in the award. He added that, the evidence brought out did not only show the applicant acted gross negligently but recklessly.

He continued to submit that, the issue of fairness of procedure which was mentioned in paragraph 6 of the applicant's affidavit, it was not argued in the written submission. He added that, it is safe to conclude it was abandoned and that issue is nothing to fault the award of the CMA.

Regarding to the issue of sanction of termination, Mr. Mbise contended that, the sanction of termination imposed on the applicant was justified. He added that, it is clear that, the applicant admit to commit misconduct and is a first offender as seen at page 3 of the written submission. He further submitted that, the case of **National Microfinance Bank PLC vs. Aizack Amos Mwapupile (supra)** cited by the counsel for the applicant is distinguishable to the facts of the case at hand and not in favour of the applicant.

Also, Mr. Mbise argued that, the sanction was not imposed to the applicant arbitrarily. He added that, it is known to every employee of the respondent that whoever is found guilty of those offences the sanction is termination. He invited this Court to refer the Rule 12 (3) of the Employment and Labour Relations (Code of Good Practice) Rules, 2007 G.N. No. 42 of 2007.

Moreover, Mr. Mbise submitted that, the Guideline 9 of the Guideline for Disciplinary, Incapacity and Incompatibility Policy and

Procedure which are part of G.N No. 42 of 2007 provide that for offences which may constitute serious misconduct and leading to termination . He added that, the applicant admit to have caused damage to his employer's expensive water treatment plant under the circumstances conclude to be gross negligence.

Lastly, the counsel for the respondent demonstrated that, all those factors were taken into consideration by the learned Arbitrator. He relied on the case of **Omary Kitwana vs. Tanzania International Services Ltd.**, Revision No. 190 of 2011 (Labour Division) at Mbeya (unreported) to cement his submission. Finally, he prayed for the Court that this application to be dismissed.

In his rejoinder, Mr. Mwakilima stated that, the counsel for the respondent had an opportunity of going through the affidavit sworn by the applicant for almost five months and he actually filed counter affidavit and he had never raised the issue of the defectiveness of the affidavit. He added that, the counsel for the XIX Rule 1 of the Civil Procedure Code without stating the Cap he was referred thereto.

He went on to submit that the preliminary objection raised by the counsel for the respondent is not proper before this Court. To buttress his position, he cited Order VIII Rule 2 of the Civil Procedure Code (Cap 33 R.E. 2019), the case of **Tanzania Red Cross Society vs. Dar es**

Salaam City Council & 3 others, Commercial Case No. 53 of 2005, High Court and **Giant Machine & Equipment Ltd. vs. Gilbert R. Mlaki & another**, Civil Case No. 05 of 2017, High Court (both unreported).

Therefore, he prayed for the Court that, the argument that the affidavit is defective should be struck out. Again, Mr. Mwakilima contended that, it is not true that the statement of the material facts is not in chronological order. He added that, the applicant at the CMA prayed for the reinstatement of which was not granted therefore, the applicant prayed for the Court to set aside and quash the award given by the CMA in the Labour Dispute No. CMA/MBY/124/2010

Regarding to the case of **Daudi Constantino vs. Coca Cola Kwanza (supra)** relied upon by the counsel for the respondent; Mr. Mwakilima argued that, it is distinguishable to the case at hand. He added that, the cited case above is speaking about the paragraphs in the affidavit sworn by the applicant was reading more like a ground of appeal than for revision which is not the case at the moment.

Also, Mr. Mwakilima contended that, the case of **Jestina George Mwakyoma** and the case of **Chairman Pentecostal Church of Mbeya (supra)** cited by the counsel for the respondent are distinguishable with the issue at hand as the issue at hand is about

labour revision the procedure is different from other normal suit. He added that, the argument raised by the counsel for the respondent challenging affidavit is afterthought.

Furthermore, the counsel for the applicant submitted that, the fact that the water treatment plant was damaged is technical one and professional of the same. And last he maintained what he submitted in his submission in chief. In conclusion, he still reiterated his prayer in chief, that the application be accepted.

Having keenly considered the contending arguments advanced by the learned counsels of the parties, the Court's record, and taken due account of the pleadings filed before this Court, the issues calling for determination are the following:

(a) Whether the commission misdirected itself on law and fact by believing that there was a training conducted to the applicant?

(b) Whether the commission misdirected itself by relying on the purported investigation report?

In the first place I wish to make it clear that the counsel for the applicant did not argue at all regarding the first and fourth ground for revision found in the affidavit supporting the application, even in his rejoinder he found no reason to do so, I am convinced to believe that he decided to abandon those two grounds.

Before I embark on considering the merit and/or demerit of the present application, I find it imperative to deal with the issue of the defectiveness of the applicant's affidavit which has been raised by the counsel for the respondent and the issue of non-citation of the number of the chapter (Cap) of the particular legislation which has been raised by the counsel for the applicant. In the first place, I wish to state that, the issue of the defectiveness of the affidavit is purely point of law.

Again, it is a Court practice that, if a party intend to raise the objection, he is required to file the notice of the preliminary objection in order to avoid to take into surprise the other party in the matter pending before the Court. Therefore, the counsel for the respondent was required to file notice of preliminary objection before and not as what he did. In other words, the counsel for the respondent raised the preliminary objection through the back door which is not acceptable in the Court practice.

On that regard, even the concern raised by the counsel for the applicant about the non-citation of the Cap is baseless and has stand at this stage therefore; I hereby struck out the said preliminary objections raised by the learned counsels.

Turning to the merit of the present application, starting with the second ground the evidence adduced by both parties at the commission

for mediation and arbitration are to the effect that there were training conducted to the applicant but PW1 and PW2 complain that training was not enough for them, the respondent produced training attendance register as exhibit that shows that the applicant attended training for five days, if applicant found that training was not enough he ought to have informed the employer that he needed more skills to the new plant, in the circumstances the complain that the commission misdirected itself by believing that there were a training conducted to the applicant has no merit.

Turning to the third ground, at the commission for mediation and arbitration, DW2 produced a report from Amertis Projects C.C, the company installed that plant, the report revealed that operators did not perform as were trained and required as some process were not performed by operators and they were filing logsheet of the plant without reading check parameters, they were not conducting back washing which culminated deposition of mud in the filter, Alarm was set out of specification required, pump was set to the manual instead of automatic, he uninstalled water pup and he failed to re install property and the process of sanitation was not conducted. Due to that report the commission for mediation and arbitration relied on it to find that the termination was substantive fait as the complainant was given training

on how to operate the same, he worked for a period of time but did not inform his employer that he had little skills on how to operate despite the training provided, for that reasons I find that the complain that the commission for mediation and arbitration misdirected itself for relying on that report is baseless.

In the circumstance I confirm the decision of the commission for mediation and arbitration.

According the application is hereby dismissed.

No orders as to costs.

D. B. NDUNGURU
JUDGE
17/02/2021

Date: 17/02/2021

Coram: D. B. Ndunguru, J

Applicant: Absent

For the Applicant: Absent

Respondent:

For the Respondent: Mr. Kelvin Gamba holding brief of Mr. Mbise – Advocate

B/C: Akida Mzee

Mr. Kelvin Gamba – Advocate:

My lord, I hold brief of Mr. Mbise who is sick. The case is for judgment, we are ready.

Court: Judgment delivered in the presence of Mr. Gamba advocate holding brief of Mr. Mbise advocate for respondent in the absence of the applicant.

D. B. NDUNGURU
JUDGE
17/02/2021