IN THE HIGH COURT OF TANZANIA
LABOUR DIVISION

AT MWANZA

REVISION NO. 08 OF 2021

JOHNSON KATUNZI.....APPLICANT

VERSUS

HYSPEC (AFRICA) TZ LIMITED.....RESPONDENT

JUDGMENT

Date of last order: 19/08/2021
Date of Judgment: 31/08/2021

M.MNYUKWA,J

Dissatisfied by the decision of the Commission for Mediation and Arbitration (herein after to be referred to as CMA) delivered on 13th January, 2021 the applicant Johnson Katunzi has filed this application under the provisions of section 91(1)(a), section 91(2)(c) of the Employment and Labour Relations Act, Cap 366 [R.E 2019] and Rule 24(1), 24 (2) (a) (b) (c) (d) (e) (f), 24 (3) (a) (b) (d) (11) (b) 28 (1) (a) (b) (c) (d) and 28 (1) (a) (b) (c) (d) and (e) of the Labour Court Rules, GN No. 107 of 2007.

The applicant praying for the following orders;

(i) That this honourable court be pleased to call for and examine the original record of the CMA's proceedings and its Award

delivered on 13th January, 2021, in labour Disputes No CMA/GTA/64/2019 for purposes of satisfying itself on the correctness and their legality of such decision or awards.

(ii) *That the impugned award be quashed and thereafter revised and re-instate the applicant to his employment*

(iii) *That this honourable court be pleased to make any other relief as the court may deem fit and just.*

At the hearing, the applicant was represented by Mr. Mtete, learned counsel while Mr. Kato, Learned counsel appeared for the respondent. With leave of this court, the application was argued orally. The application is supported by the sworn affidavit of Johnson Katunzi while the respondent through human resource manager, Azza Azzuna challenged the application by filing a counter affidavit.

Briefly the facts leading to this application are mainly that applicant was employed by respondent as a Hose Technician Repair Pump from 18th July 2016 up to 29th October 2019 when his employment was terminated. He was terminated on the reason of misconduct for insubordination. Aggrieved by the decision, the applicant referred the matter to CMA. CMA decided in his favour. Being unsatisfied with some findings on the decision of the CMA, the applicant has filed the present application before this court.

Arguing in support of the application, the applicant's counsel prayed the affidavit of Johnson Katunzi to be adopted to form part of his submission. The applicant's counsel strongly submitted that the respondent failed to prove the charge of insubordination even though he was accused for failure to discharge his duty. He added that the respondent terminated the applicant's employment on the reason of insubordination because the applicant failed to sign letters dispatched to him. He insisted that page 3 paragraph 3 of the CMA Award provides that the applicant was not doing any job at his work place assigned by his employer (the respondent) while the charge revealed that the applicant was charged with the misconduct of insubordination.

On the second ground, the applicant's counsel submitted that, the trial arbitrator did not properly evaluate the evidence the evidence given by the PW1 and exhibit P1 tendered before the CMA. He averred that page 7 and 8 of the CMA proceedings, PW1 stated that he was suffering from lower back pain since 2018 and his employer was well informed on his problem. He argued that, if the arbitrator could have taken into consideration the evidence of PW1 could not have reached such kind of decision.

On the third ground, the counsel for the applicant submitted that, the procedure for termination of the applicant were not followed. He pointed out that the notice of attending disciplinary meeting was given in contravention to the requirement of Regulation 13(3) of the GN No 42/2007 which requires the notice to be given not less than 48 hours before the meeting while in our case at hand the applicant was given within 24 hours. Another procedural irregularity was the presence of DWI who is a complainant and at the same time form part of the committee members in the disciplinary meeting as he was the secretary in that meeting. He went on to state that, it was against the principle of natural justice since no ane can be a judge on his own case. He added that section 37(1)(2)(3) of the Employment and Labour Relations Act, Cap 366 R.E 2019 requires the termination of the employee to be fair in terms of the reason and the procedure. He averred that the termination of the applicant in our case at hand was not fair in terms of the reasons as well as procedure. He insisted that, exhibit D1 should not be relied on because there was no valid meeting that confirm the punishment as well as no minutes of the said meeting.

He went on to state that, the applicant was not given a right to defend his case against the disciplinary committee which is contrary to

article 13(6) of the Constitution of the United Republic of Tanzania. He supported his argument by referring to the case of **DPP v Kinyasi Tesha and Raphael Tesha** [1993] TLR 237(CA) which emphasize the right to be heard.

On another ground, he submitted that the arbitrator erred in awarding the applicant as per the requirement of the law. He stated that, looking at page 17 of the Award, the arbitrator found that the employer did not follow the proper procedure when terminating the applicant from employment. If the termination is unfair, the law is clear that its remedy is available under section 40(1) (a)(b)and (c) of the Employment and Labour Relations Act, Cap 366 [R.E 2019]. He supported his argument by referring the case of **Pili Mosi Saburi & 50 others vs Rushari Investment Limited**, Labour Revision No 3 of 2018 HC Labour Revision at Tanga.

He went on to submit that the applicant acknowledged to receive the payment of Tsh 3,420,300/ from the respondent contrary to what has been ordered by the CMA. The arbitrator ordered the applicant to be paid Tshs 5,160,000/= though the same was not the correct award deserved to be paid to the applicant. He added that, looking at the last page of the CMA Award, the arbitrator claimed that other payments were paid to the

applicant as per the letter of termination. That was not true because apart from payment of Tshs 3,420,300/=, the applicant was only paid one months' notice and leave pay only. He was not paid his salaries from the day he was terminated until when his case was completed.

In responding, the respondent adopted the counter affidavit sworn in by Azza Azzuna to form part of his submission. He averred that the applicant was terminated by the charge of insubordination for failure to obey the lawful order of the respondent and refusal to work. He added that the applicant repeatedly, commit the offence of insubordination which resulted the respondent to initiate the disciplinary action against him. He went on to state that the above offences are provided under GN No 42 of 2007.

The counsel for the applicant went on to submit that the evidence adduced before the tribunal by both parties shows that the applicant committed that offence. He referred to page 15. 16 and 17 of the CMA Award which support the arbitrator's finding that the applicant committed an offence of insubordination. He went on to state that the applicant was given warning letter which was admitted as exhibit D1 and a notice to show cause which was admitted as exhibit D2. He averred that, since the

applicant refused to work and to receive letters dispatched to him, the respondent believed that the applicant committed disciplinary offence in the place of work.

He went on to submit that it is not true that the arbitrator did not take into consideration the evidence of PW1 and exhibit P1. It was his submission that exhibit P1 was not given weight by the court because the same was tendered by the applicant on the day when the disciplinary meeting was conducted by alleging that he was sick and produced the medical report that's why his reason of sickness was considered as an afterthought.

On the procedure of termination, the counsel for the respondent averred that all the required procedure were followed in accordance to GN No 42 of 2007. He submitted that, the applicant was given a warning letter, a notice to show cause, a notice to attend the disciplinary meeting and finally he was given the decision of the disciplinary committee and he was informed of his right to appeal. Furthermore, he was given a right to defend his case in the disciplinary committee.

The learned counsel for the respondent averred that the burden of proving if the termination was fair rest to the respondent (employer) and

the standard of proof is on the balance of probabilities. He added that the procedure of termination is not a checklist, what is important is to adhere to all the required procedure in which the applicant in this case complied with.

On the other ground of revision, the respondent submitted that it is not true that the DWI was a complainant and at the same time was the member in the disciplinary meeting. He insisted that DW1 attended the meeting as a witness on the side of the complainant which is in accordance to Rule 13(5) of GN. No. 42 of 2007.

On the amount awarded as compensation, the counsel for the respondent submitted that, at page 17 of the arbitral award the arbitrator's finding was that there was fair reasons for termination though there was procedural irregularity, that's why the applicant was given 6 months' compensation. He went on to state that the respondent had already executed what he was ordered by the CMA in its award. He added that the applicant and the respondent signed a deed of settlement on 18/12/2020 to end the present labour dispute amicably, but surprisingly, he signed the deed of settlement while he was already filed labour revision at the High

Court. By doing so, the applicant went against the spirit of the labour laws which encourages parties to end dispute amicably.

On the allegation that the applicant was paid Tsh 3,420,300/= instead of 5, 160,000/= as awarded by the CMA, the counsel for the respondent submitted that the applicant was paid such amount after deducting government tax as per the requirement of the law. He added that the applicant was paid all his entitlement as per the letter of termination. He insisted that the applicant was paid his one month salary in lieu of notice on his October salary, he was given certificate of service and he was not given severance pay because his termination was on a disciplinary misconduct. He prayed the court to dismiss his revision because what has been awarded by CMA was paid to the applicant.

In rejoining, the applicant's counsel reiterated his submission in chief and he averred that, the record does not show if the applicant was given warning letter and a letter to show cause. He added that DWI attended in the disciplinary committee as a secretary, also there is no record if the amount deducted was paid as a government tax.

After considering the parties submissions, court records as well as relevant laws applicable and practice, I find the key issues for determination in this case to be;

(i) Whether there was valid reason for termination of the applicant employment

(ii) Whether the procedure for termination was fair

(iii) Whether the reliefs provided in the CMA Award is justified.

In respect with the first issue as to whether there was valid reason for termination of the applicant employment or not, the Emplyment and Labour Relations Act, Cap. 366 [R.E 2019] under section 37(1) and (2) requires the termination of the employment by the employer to be fair substantively and procedurally. In ither words there should be a valid reason for termination and a fair procedure.

Section 37(1) of the above law provides that it shall be unlawful for an employer to terminate the employment of an employee unfairly

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 case of **Tanzania Railway Limited vs Mwajuma Said Semkiwa,** Labour Revision No 239 of 2014, High Court Labour Division at Dar es Salaam as cited in the case of **MIC Tanzania PLC vs Sinai Mwakisisile**, Revision No. 387 of 2019. The court held that:

> *"It is established principle that for the termination of employment to be considered fair it should be based on valid reason and fair procedure. In other words, there must be substantive fairness and procedural fairness of termination of employment."*

In the application at hand, the respondent submitted that the applicant committed the misconduct of insubordination because he refused to sign the dispatched letter without assigning any reason thereto. That assertion was proved through the evidence of DW1 and DW2 who averred that the applicant refused to sign exhibit D1 and D2. Their testimonies

were joined hands with the evidence of the applicant as it is reflected on page 38 of the CMA proceedings that he refused to sign Exhibit D1 and D2.

On the other side, the applicant's counsel averred that looking at page 3 of the CMA Award, the arbitral findings revealed that the applicant was charged with the offence of failure to discharge his duty properly and therefore on that basis, the respondent failed to prove the offence charged. In other words, the applicant was terminated from the employment on the offence of which he was not charged with.

After considering the argument of both parties in this ground, I have gone through page 3 of the arbitral award, and what I found on that page is the summary of the evidence of DW1 testified before the CMA whereby among other things it revealed that the applicant refused to work as well as refused to sign the letter dispatched to him which is insubordination. Therefore, the summary of the evidence cannot be regarded as the decision of the arbitrator.

In his affidavit filed in this Court and oral submission presented by his advocate, the applicant averred that the arbitrator failed to consider that he was sick and his employer was well informed about his sickness.

Going through the available records it is clear that the applicant did not officially communicate to the respondent about his sickness, but again sickness was not the ground that were used to terminate the respondent from the employment as evidenced on exhibit D4 which is the outcome of the disciplinary hearing committee and exhibit D5 which is the letter showing intention to terminate employment contract. All these two exhibits its contents shows that the applicant was found guilty and terminated with the offence of gross misconduct for insubordination.

To understand for which offence the applicant was charged with, I had revisited exhibit D3 which is a Notice to attend the Disciplinary Enquiry and this is because it is the notice which is used to initiate disciplinary proceedings but also provide the offences in which the applicant was charged with. Upon looking carefully of the said notice, I find part of the contents of the said notice reads as follows

"The nature of alleged offence/complaint/misconduct is

- *You are not cooperative and thus insubordination*
- *You refused to sign the allegation which you were charged with and told to abide and change your behaviour on 17th September 2019*

Looking at the wording of bullet one and two of exhibit D3, it is clear that among other things the applicant was charged with the offence of insubordination. The evidence on record show that the applicant intentional disobeyed the lawful order of his employer which in fact it is a sign or disrespect. In our case at hand it seems the applicant did not regret of what he has done as reflected in his evidence that he refused to receive the letter that was dispatched to him.

The Employment and Labour Relations (Code of Good Practice) Rules, GN No. 42 of 2007 under the Schedule provides the offences which may constitute serious misconduct and leading to termination of the employment in which insubordination is one of them.

Thus, as it is provided by The Employment and Labour Relations (Code of Good Practice) Rules, GN No. 42 of 2007, Insubordination is a valid reason to terminate the employment of the applicant. The arbitrator rightly decided that the employer managed to prove the charges of insubordination against the applicant. The findings of the arbitrator at page 14 and 15 of the CMA Award revealed that the available evidence prove the offence of insubordination against the applicant. The part of the contents of the Award of the arbitrator reads s follows

"Tume inaona kuwa mwajiri/mlalamikiwa alikuwa na sababu halali katika kufikia ukomo ajira ya mlalamikaji, kwa nini nasema hivi:

Moja. Katika Ushahidi wake mlalamikaji mwenyewe alikiri mbele ya tume kuwa alikataa kusaini kielelezo D1 na D2. Tume inaona kitendo cha mlalamikaji kukaidi kusaini barua za mwajiri ni utovu wa nidhamu, iwapo mlalaimkaji aliona barua hizo au onyo hilo lilikuwa kinyume na taratibu za kazi alipaswa kuanzisha grievance procedure kwa huyo kiongozi aliyempa barua ama kwa lugha nyingine kumshtaki kwa uongozi wa juu."

From the above discussion, it is my finding that there is sufficient evidence that the employer had a valid reason to terminate the employment of the applicant on the reason of insubordination. Therefore, the answer to the first issue is positive.

On the second issue as to whether the procedure for termination was fair or not, the Hon. Arbitrator found that the respondent did not adhere with the procedure of terminating the applicant's employment. The CMA Award at page 17 provides that the respondent contravenes with the requirement of Regulation 13(3) and (8) of the Employment and Labour Relations (Code of Good Practice) GN No 42 of 2007 and also the warning

letter that was issued serve as a letter to show cause, he pointed out that, the letter does not benefit the applicant.

On his part the applicant's affidavit alleged that the respondent failed to follow the laid down procedure when terminating his employment. Some of the procedure that were not followed including the presence of DW1 as a complainant as well as a decision maker, there was no a meeting that resolved the applicant to be given warning letter before issuing the same. In his submission, the counsel for the applicant agreed with the arbitrator's findings that there were some procedural irregularities on terminating the applicant's employment. He added that, apart from that anomaly which has been found by the arbitrator the applicant was not given a right to be heard before the disciplinary committee which is contrary to article 13(6) of the Constitution of the United Republic of Tanzania.

In contention, the respondent's counsel submitted that, the procedure for termination of the employment contract is not a checklist, what is important is for the employer to follow all the laid down procedure before terminating the contract of employment in which they have done the same to the applicant. The counsel added that, all the required procedure in accordance to the Employment and Labour Relations (Code of

Good Practice) GN No 42 of 2007 were followed. He averred that the applicant was served with warning letter, a Notice to show cause, and a Notice to attend the disciplinary meeting. He was also given the decision of the disciplinary meeting and informed his right to appeal if he was aggrieved with the decision.

In the case of **The Registered Trustees of the Archdiocese of Dar es Salaam vs The Chairman of Bunju Village Government and 11 others,** Civil Appeal No. 147 0f 2006 as cited in the case of **Pangea Minerals Ltd vs Mussa Mateye,** Revision No 61 of 2018 HC Labour Division at Shinyanga, the court held that

> *"With respect however,* ***submissions are not evidence****. Submissions are generally means to reflect the general features of the party's case. They are elaborations on evidence already tendered. They are expected to contain arguments on the applicable law. They are not intended to be substitute evidence."*

On the issue of the failure by the respondent to follow the fair procedure when terminating the applicant's employment, I subscribe with the findings of arbitrator that some of the procedures were not properly followed when terminating the applicant's employment as it was correctly decided at page

17 of the CMA Award. The issue of the applicant's being denied the right to be heard in the disciplinary meeting was not featured in the affidavit which form part of the evidence as well in the CMA proceedings. The same is raised in the submission of the applicant and without any proof as to how the applicant was denied his right to be heard. In that aspect, I don't agree with the applicant counsel.

It is true that the available record show that the notice to attend the disciplinary committee was issued 24 hours before the meeting, this is contrary to the requirement of Regulation 13(3) which requires the notice to be given not less than 48 hours before the meeting. Again, because the minutes of the Disciplinary meeting were not availed before the CMA, the respondent cannot deny the allegation of the applicant that DWI was attended as a witness as well as a member of the disciplinary committee. As it was rightly submitted by the counsel of the applicant this is contrary to the principle of natural justice because no one can be a judge on his own case.

The allegation that the applicant was not given a chance to attend the management meeting which deliberate on his misconduct before issuing the warning letter to him, I don't think if under the law there is such kind

of the requirement. The chances of the employee to defend is when the formal charge has been established either by attending a disciplinary committee and afford him with the right to be heard or by giving him a notice to show cause.

From the above discussion, I agree with the arbitrator's findings that there was procedural irregularity on terminating the applicant from employment. The respondent did not adhere to the fair procedure on terminating the applicant from employment. Therefore, I find that the termination was unfair procedurally.

The last issue is whether the relief provided by the CMA is justified. At page 18 of the CMA Award, the arbitrator awarded the applicant 6 month's salary compensation to the tune of Tsh 5,160,000/= for unfair termination. The arbitrator also ruled that other entitlement has already been paid to the applicant by the respondent and that the applicant failed to prove if he was entitled to be paid repatriation costs.

On this issue, the applicant's counsel submitted that other entitlements were not paid to the applicant as they have been mentioned in the letter of termination. He went on to state that the applicant was given Tsh 3, 420,300/= instead of Tsh 5, 160,000/= as it was ordered by the CMA. He

insisted that the applicant was paid one month's salary and leave pay only and he was not given his salary from the day when he was terminated up to when the case was completed. In contention the respondent's counsel submitted that the applicant was paid Tsh 3, 420,300/= after deducting government tax instead of Tsh 5, 160,000/= He added that the arbitrator was right to order compensation of 6 months after finding that there was a valid reason for termination but the procedure was unfair. He insisted that the applicant was paid all his entitlement as per the letter of termination including the certificate of service, one month's salary which was paid together his salary for the month of October.

I have gone through the notice of opposition and the counter affidavit of the respondent and could not meet a single line sentence showing that the deducted amount was paid as a governement tax. Had the respondent paid the said tax as alleged, he would have attached the tax payment slip from the Tanzania Revenue Authority to substantiate his claim. As I earlier subscribe from the decision of the case of **The Registered Trustees of the Archdiocese of Dar es Salaam** (supra) **submissions are not evidence**. The applicant's counsel raised the issue of payment of the government tax from the Award of the CMA during the hearing. While I agree that payment of government tax is compulsory and

that as a general rule every income is subject to taxation, still there is a need to prove the claim. In our case at hand, the respondent had the opportunity to do so when he was replying to the applicant's affidavit as he was able to attach proof of payment through Annexure R-1.

My position is therefore that there is no proof that the amount deducted were paid as a government tax by the respondent. In the absence of the proof, it is very difficult to believe that the same has been paid as alleged. Therefore, it is my conviction that CMA Award should be honoured as ordered.

On the issue of 6 months' compensation, I agree with the CMA award that it is not in all cases when there is procedural unfairness the arbitrator may award compensation of less than 12 month's salary.

In the case of **Felician Rutwaza vs World Vision Tanzania,** Civil Appeal No 213 of 2019, CAT at Bukoba when cited the case of **Sadetra (SPRL) Ltd vs Mezza & Another,** Labour Revision No 207 of 2008 unreported) on interpreted section 40(1) (c) of the Emplyment and Labour Relations Act, the court held that

"... a reading of other section of the Act gives a distinct impression that the law abhors substantive unfairness,

the remedy for the former attracts a heavier penalty than the letter.

Likewise in the same case of **Felician Rutwaza** (supra) the Court of Appeal stated that

> *"Were spectfully subscribe to the above interpretation, for we think it is founded on logic and common sense; it reflects a correct interpretation of the law. Under the circumstances, since the learned Judge found the reasons for the appellant's termination were valid and fair, she was right in exercising her discretion ordering lesser compensation than that awarded by the CMA. We sustain that award."*

Guided by the above decided cases, as I have already made the findings in the first and second issue that the termination was substantively fair and valid but was unfair procedurally, it is my considered view that the award of 6 months' compensation as it was rightly awarded by the CMA is fair to the applicant.

For the circumstances of this case, the applicant cannot be reinstated from employment because there was a valid reason for termination. He can also not be entitled to be paid repatriation costs because he failed to prove the same.

In the upshot, it is the finding of this court that the applicant should be paid as awarded by the CMA that is Tsh 5,160,000/= instead of Tsh 3,420,200/. I therefore upheld the CMA Award and Revision Application is partly allowed to the extent shown. No order as to costs. It is so ordered.

Right of appeal explained.

M. Mnyukwa
JUDGE
31/08/2021

Judgement delivered on 31/08/2021 via audio teleconference whereby all parties were remotely present.

M. Mnyukwa
JUDGE
31/08/2021