IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT MWANZA

LABOUR REVISION No. 62 OF 2020

(Original CMA/MUS/210/2019)

GRUMET RESERVES ----------APPLICANT

VERSUS

JANETH KIPEJA----------RESONDENT

JUDGMENT

06th July, & 09thAugust, 2021

TIGANGA, J

In this matter the court has been moved under sections 91(1)(a),(b),(2),(b) and (c) 91(4)(a),(b) and 94(1)(b),(i) of the Employment and Labour Relations Act No. 6 of 2004, [Cap 366 R.E 2019] and Rule 24(1), 24(2)(a),(b),(c),(d),(e),(f), and 24(3)(a),(b),(c) (d), and Rule 28 (1),(c),(d),(e) and (2) of the Labour Court Rules, 2007, GN No.106 of 2007.

The application has been preferred by chamber summons which was supported by the affidavit sworn by Sem Kakiva, who introduced himself as the Human Resource Manager of the applicant. Together with these two

documents, the notice of application and notice of representation were also filed. The orders sought in the chamber summons are:

1. For this court to be pleased to call for records, revise and set aside the Arbitrator's award dated 16th day of July 2020 by Hon. Nnembuka, K, (Arbitrator) made in Labour Dispute No. CMA/MUS/210/2019 on the ground set forth in the annexed affidavit and on such other grounds which may be adduced on a hearing date.
2. That this Honourable Court be pleased to determine the matter in the manner it consider appropriate and give any other relief it considers just to grant.

The brief background of this application as can be deciphered from the affidavits and the records from the Commission for Mediation and Arbitration is as follows. The respondent was employed by the applicant as a Cash Management Officer since on 01st September, 2016 up to 30th August 2018 when she was terminated from employment on the offences of gross negligence and failure to supply services for which she was employed, causing loss to the employer and misappropriation of the

Company's funds. She was found guilty and consequently terminated for misappropriation of the Company's funds and gross negligence.

Dissatisfied by the decision of the employer, the respondent referred the complaint to the CMA, where she asked for reinstatement without losing remuneration. After full hearing before the CMA, on 16/07/2020 the CMA ordered the reinstatement of the respondent to her employment on the ground that the termination was procedurally and substantively unfair.

Having been aggrieved by the award, the applicant filed this application to challenge the award on the following grounds.

1. That the arbitrator erred in law and fact for his failure to evaluate evidence adduced by the applicant who proved fairness in termination of the respondent on the balance of probability
2. That the arbitrator erred in law and fact in disregarding all documentary evidence in support of the applicant's case and relied on mere word of the respondent which had no any supporting documentary evidence.
3. That the Arbitrator erred in law and facts in holding that the applicant failed to prove the offences of gross negligence and failure to supply services for which she was employed,

4. That the Arbitrator erred in law and facts in holding that even if the respondent admitted some of the offences, termination of her employment was not appropriate sanction
5. That the Arbitrator immensely failed to analyse documentary evidence which shows clearly that during the disciplinary hearing the respondent admitted the offences.
6. That the Arbitrator erred in law and facts in contradicting himself on one hand holding that the applicant did not prove the offences and on the other hand holding that the offences committed by the respondent did not warrant termination of her employment.
7. That the Arbitrator erred in law and facts in holding that there was no evidence to show the rules which the respondent contravene and the amount of financial loss while were clearly shown in the charge sheet.
8. That the Arbitrator erred in law and facts in holding that the termination letter was written before the recommendation of termination of the employment of the respondent by the disciplinary hearing Committee

9. That the Arbitrator erred in law and facts in holding that the respondent was not given right to be heard at the appeal stage.

10. That the Arbitrator erred in law and fact to the extent that after holding that the termination was unfair, ordering reinstatement without considering the circumstances that the respondent admitted that she had personal conflict with her immediate supervisor and by admitting some of offences proved dishonest.

The affidavit raised six legal issues emanating from the errors of the CMA which should be addressed by this court that;

(a) Whether the Arbitrator properly evaluated the evidence adduced by the applicant before he reached the conclusion that the termination was unfair.

(b) Whether the Arbitrator disregarded documentary evidence of the applicant which proved the case and on the other hand relying on mere words of the respondent that she did not commit the alleged offence.

(c) Whether the Arbitrator properly erred in law and fact in holding that the applicant did not prove reasons for termination of the respondent's employment contract.

(d) Whether the Arbitrator properly erred in law and fact to the extent that after holding that the termination was unfair the reinstatement was the appropriate remedy.

(e) Whether or not the termination letter was written before the recommendation of termination of employment of the respondent by the disciplinary hearing committee.

(f) Whether or not the respondent was given right to be heard in the appeal stage.

The applicant prayed that the application be granted, the Arbitrator's award be revised and set aside for it being improperly procured, unlawful, illogical and irrational.

The application was countered by the respondent by filing the Notice of opposition, Notice of Representation which introduced one Erick Martin Mutta, Advocate as the representative of the respondent and the counter affidavit sworn by the respondent in which the respondent deposed that the award based on the evidence as presented, analysed and evaluated by the Commission, therefore the award was logical and fair.

The applicant was represented by Mr. Godfrey Tesha, learned counsel, while the respondent enjoyed the service of Mr. Erick Martin Mutta, also learned Counsel. On the request by the parties and by the order of this court, the hearing of the application was by written submissions which were filed by the parties as scheduled.

In the submission in chief filed by the counsel for the applicant, she informed the court that, by virtue of her employment the respondent was mandated to ensure two things, one, that each transaction is supported by genuine and authentic documents and two, she was a custodian of cash money of the applicant and therefore she was supposed to make sure the applicant's money are not mis appropriated or mismanaged. He submitted that at the disciplinary hearing, the respondent admitted to have committed the professional misconduct by writing some of the retirement receipt of the service rendered on her, by her own hand and not the service provider thereby causing the feeling of suspicion that the receipts were not genuine and authentic and were crafted to misappropriate the applicant's money. He cited the example of exhibit D5 in which the respondent pretended to have paid Tshs. 1,020,000/= for consultation, medical service and medication while at the same time she was proved to

be in the office working by other evidence, and D7 in which the amount of Tshs. 1,020,000/= and 1,000,000/= were involved.

He submitted further that, in exhibit D8 she admitted to have claimed double payment for one service and said she did not realize that she had already claimed and received the money. He submitted that the Arbitrator found that the respondent committed the offence, but held that the offences she committed did not warrant termination, only the warning was enough, therefore that there were no reasons for termination. He reminded the court that the respondent was employed as Cash Management Officer who was entrusted to handle the applicant's money, he argued that the financial related position in dealing with money requires maximum integrity and trustworthiness. The loss of integrity and trust in his office also erodes trust from the employer. He submitted that the Arbitrator also said the amount of loss was not established while it was clearly shown at page 4 (j) of exhibit D5.

Regarding the issue of procedure of termination of employment the Hon. Arbitrator held that the procedure of termination was not followed in that the respondent was terminated before the recommendation of the chairperson and before her appeal was heard and determined, he said the

arbitrator misconceived the evidence because the hearing was conducted from 27/08/2018 and concluded on 30/08/2018. He insisted that the respondent was terminated on 30/08/2018 as reflected in exhibit D6 and D7 the hearing form and the hearing minutes respectively. He also submitted that, the appeal was heard and determined as proved by exhibit D9.

He submitted that the arbitrator erred in law and fact to order reinstatement of the respondent without considering the circumstances surrounding termination which were such that a continued employment relationship would be intolerable on the following reasons, first, it was said by the respondent during hearing that, she had a dispute with her boss the Director of Finance as clearly indicated at page 9 paragraph 1 of the typed award. According to him, this is according to rule 32(2)(b) of GN. No. 67 of 2007. The fact that she was a Finance Management Officer, the position which required the highest degree of honest and integrity which she was proved to be lacking, that made the employment relationship between the applicant and respondent break down irreparably as there will be no more trust between them.

He prayed in the end that the Award be revised and set aside for it being improperly procured, unlawful, illogical and irrational.

The counsel for the respondent submitted that the respondent was in support of the Award and its findings that the termination was unfair contrary to section 37(2)(a) and (c) of the Employment and Labour Relations Act [Cap 366 R.E 2019] of which the applicant failed to prove both the valid reason and fair procedure.

He submitted that the respondent was charged with gross negligence, failure to supply service which she was contracted for, causing loss to her employer, and misappropriation of the company funds. He said the charge mentioned a number of documents which were the imprest number 13181, 13403, 13334, 13924, 14411, 14510, 14570, 15252, and 15274, the PCV numbered 6824, 8372, 8466, 8576, 9433, 63622, 65162, 65142, and 61808 as well as receipt number707, 714, 6310, 6322, 61755, 6314, and 6338. He said all these documents were not tendered as exhibit and as according to DW1 the receipt are used to prove expenditures, payment voucher (PCV) is for withdrawing money from the company and imprest to retire or claim extra money from the company. So if all these documents hereinabove were not tendered as exhibit both at disciplinary

committee and before the Commission, this renders the conclusion that the offence were not committed and the allegations were not proved as detailed in exhibit D5 and far enough to the respondent being a Cash Management Officer did qualify her to have a sole mandate into all financial matters. He referred the court to the exhibit D7 at page 4 where one Robin was mentioned to have stated that all documents were genuine and also the allegation involved double claim was not proved as no any document tendered to prove that the respondent claimed the payments and was paid.

Regarding the allegations of misappropriation of the company's fund for involving medical payments to the dependants who do not cover, at page 30 of the typed proceedings and exhibits C3 and C4 the respondent testified all the procedure on how the dependants are covered under HR policy.

Regarding the procedure of termination he submitted that exhibit D7 which was signed by one Malcom Cook was issued on 01/09/2018 while exhibit D10 which is a termination letter was delivered to the respondent on 30/08/2018 a day before final report of the chairman of the disciplinary committees issued the report. The report informed the respondent of her

right to appeal. This means according to him, that the respondent was not accorded with fair and complete right to be heard.

Regarding the right of each parties; he joined issue with the counsel for the applicant that as the position involve trust of the parties therefore the appropriate remedy could not have been reinstatement, he prayed the following orders;

i) That the applicant cough compensation of 36 months in accordance of exhibit C2 which provides the salary of the respondent was Tshs. 1,700,000/=

ii) Benefits enshrined under exhibit 10 which are not yet paid up to now be complied accordingly that is one month salary in lieu of notice, transport to the place of recruitment and one month salary serve as leave.

iii) Severance pay

The said benefits are in accordance with sections 40, 41, 42, and 43 of the Employment and Labour Relations Act, [Cap. 366 R.E 2019].

In rejoinder the applicant submitted that the respondent admitted most of the charges before the disciplinary hearing therefore even if the

applicant failed to bring and tender some of the documentary evidence that did not negate the fact that he fraudulently used the document to misappropriate the applicant's money. He submitted that under section 60 of the Evidence Act [Cap. 6 R.E 2019] that there is no need of proving the fact which has been admitted. Therefore since most of the charges were admitted at the hearing, there was no need of proving the same at the CMA by tendering documents.

Further to that, the fact that the respondent admitted to have committed the offence relating to the office she was employed to man, lost the trust between the employee and employer.

Regarding the procedure, he referred to exhibits "D6," "D8" and "D9" shows clearly that the hearing was conducted and concluded between 27/08/2018 to 30/08/2018 when the respondent was given a termination letter and therefore it is not true that the respondent was not accorded fair hearing.

On the right of the parties he asked the court to take judicial notice of paragraph 3 of the respondent's submission that she admitted that the reinstatement was not a proper remedy due to the circumstances involving

trusts of the parties. However the respondent has asked the reinstatement to be substituted with the 36 months salary compensation.

He said that since both parties are in agreement that the Arbitrator erred in selecting the proper remedy, he asked the court to take this error which goes to root of the award.

He submitted that in the case of **African Assay Laboratory (T) Ltd vs Norah Nicholous,** Revision No. 68 of 2018 HC-Labour Div. DSM in which it was held that as of now it is the position of the law that for a court to award more than 12 months compensation, it must give reasons for doing so.

In the case of **NMB Ltd vs Eliamini Mbeo**, Revision No. 53 of 2013 it was where the court held that in order for the arbitrator to award more or less than 12 months provided he has justifiable ground for doing so as rule 32(5)(a) to (f) of the GN. 67 of 2007. In this case there is no any reason provided as why this Court should substitute the reinstatement with compensation of 36 months instead of 12 months.

On issue of other benefits this was not raised at the CMA, therefore it cannot be raised at this stage of revision. He prayed the award by the

Arbitrator be revised and set aside for it is improperly, procured, unlawful, illogical and irrational.

That being the summary of the application and the affidavits as well as the submissions by the counsel for the parties, it is worthy to note that the applicant raised ten complaints in the affidavit filed in support of the application, and from these complaints he proposed and framed six issues which he invited the court to consider and determine. And for purpose of good and systematic flow of the reasoning I will combine and consolidate the first and second issues as they both relate to the consideration and evaluation of evidence.

After consolidating them they read as follows, "whether the Arbitrator properly evaluated the evidence adduced by the applicant which included the documentary evidence of the applicant tendered to prove the case as opposed to mere words of the respondent that he did not commit the offence, before he reached the conclusion that the termination was unfair."

I have passed through the proceedings and the award I find the Arbitrator considered the evidence of both parties and made analysis of the same before he reached to the decision. He also considered the documentary evidence tendered by the applicant and the oral evidence by

the respondent. Whether the conclusion was correct or not, that will be resolved in the following issues. But what I find at this stage is that, the Arbitrator considered the evidence both oral and documentary and properly analysed the same.

On the third issue which is whether the Arbitrator was justified to hold that, the applicant did not prove reasons for termination of the respondent's employment contract. In resolving this issue, I find it important to make reference to the provision of section 37 of the Employment and Labour Relations Act (supra) which provides that, all termination of employment of the employee by employer must be lawful and fair. Therefore it shall be unlawful for an employer to terminate the employment of an employee unfairly. The employment is taken to be fair if it is premised, **first,** on **valid and fair reasons** for termination which are (i) related to the employee's conduct, capacity or compatibility; or (ii) based on the operational requirements of the employer, and second, that the employment was terminated in accordance with a **fair procedure** in terms of section 37(2)(a)(b)(i)(ii) and (c) of the Employment and Labour Relations Act, (supra)

It is also the stand of the law, that is section 37(4), of the same law as cited above that, in deciding whether a termination by an employer is fair, an employer, arbitrator or Labour Court, shall take into account any **Code of Good Practice published under section 99.** [emphasis supplied]

The code of good practice referred to in subsection 4 of section 37 is the Employment and Labour Relations (Code of Good Practice) G.N. No. 42 of 2007 and the relevant provision which was also relied upon by the arbitrator is Rule 12(1) which provides that;

> *"Any employer, arbitrator or judge who is required to decide as to whether termination for misconduct is unfair shall consider-*
>
> *(a) whether or not the employee contravened a rule or standard regulating conduct relating to employment;*
>
> *(b) if the rule or standard was contravened, whether or not;*
>
> *(i) it is reasonable;*
>
> *(ii) it is clear and unambiguous;*
>
> *(iii) the employee was aware of it, or could reasonably be expected to have been aware of it;*
>
> *(iv) it has been consistently applied by the employer; and*

(v) ***termination is an***

contravening it.

(2) First offence of an employee s

unless it is proved that ***the miscon***

makes a continued em

intolerable*.*

(3) The acts which may justify term

(a) gross dishonesty;

(b) willful damage to property,

(c) willful endangering the saf

(d) gross negligence;

(e) assault on a co-employee, supplier, customer or a member of the family of, and any person associated with, the employer; and

(4) In determining whether or not termination is the appropriate sanction, the employer should consider:-

(a) the seriousness of the misconduct in the light of the nature of the job and the circumstances in which it occurred, *health and safety, and the likelihood of repetition; or*

(b) ***the circumstances of the employee such as the employee's employment record, length of service, previous disciplinary record and personal circumstances****.* [Emphasis supplied]

From these provisions, it is glaringly clear that, section 37 of the Employment and Labour Relations Act, (supra), must be read together with the Employment and Labour Relations Act, (Code of Good Practice) (supra). These two laws read together, the following are the clear directives to take into account before an employer terminates the employee and the termination is taken to be valid and upheld by Arbitrator or the Court that;

(i) Where the employee contravened a rule or standard regulating conduct relating to employment; which is reasonable, clear, unambiguous, and the employee was aware of, or could reasonably be expected to have been aware of, and it has been consistently applied by the employer,

(ii) Acts which shall justify termination are gross dishonesty, willful damage to property, willful endangering the safety of others, gross negligence, assault on a co-employee, supplier, customer or a member of the family of, and any person associated with, the employer,

(iii) The first offence/misconduct of an employee shall not justify termination,

(iv) The termination may only base on the first offence/misconduct if it is proved to be so serious that it makes a continued employment relationship intolerable,

(v) If that offence/misconduct relates to damage to the property of employer, then it must be established that the act was done willfully,

(vi) Taking into account the nature of the job and the circumstances in which it occurred, that misconduct is so serious to endanger health and safety, and there is a likelihood of repetition,

(vii) Looking at the circumstances of the employee such as the employee's employment record, length of service, previous disciplinary record and personal circumstances the misconducts merits termination.

In this case, respondent was charged with gross negligence, failure to supply service which she was contracted for, causing loss to her employer, and misappropriation of the company's funds. The issue is

whether these offences constitute gross misconduct, it has been universally accepted that some and actually main acts which constitute gross misconduct are theft, fraud, gross negligence, and physical violence, gross dishonesty, willful damage to property, willful endangering the safety of others, assault on a co-employee, suppliers, customers or a members of the family of, and any person associated with, the employers.

In this case the applicant tried its best to prove that it had good reasons for terminating the respondent, and that the same proved the mis appropriation of money following his double claiming of money for a single service obtained, using the receipts purportedly issued by the service providers but written by her hand writings, all these being dishonest conduct, and failure or neglect to make sure that all payments are accompanied by necessary documents. Most of the impeached imprests, PCV and receipts, though were mentioned in the charge sheet, but they were not tendered as exhibit as proved at pages 18, 19, 20 and 21. Further to that the applicant, according to the evidence by DW1 when cross examined by the counsel for the respondent, he admitted not to have cross checked with the Gisani hospital from which the respondent received

service to prove as to whether the receipts were issued by them and they are genuine receipts of theirs.

In his submission, the counsel for the applicant submitted that the respondent admitted to have committed the offence therefore under section 60 of the evidence Act, there was no requirement to prove the said facts.

First and foremost, it should be noted that under section 39 of the Employment and Labour Relations Act, (supra) provides that;

> *"In any proceedings concerning unfair termination of an employee by an employer, the employer shall prove that the termination is fair."*

The applicant was expected as a matter of law to prove that the termination of the respondent based on valid and fair reasons; that duty was not expected to end up in alleging, it was required to go further and produce concrete evidence to prove the accusations against the respondent except those which were admitted. Now, is there any fact which was admitted? If there was any admission then the same was supposed to be shown in the proceedings of the disciplinary hearing. However, I have keenly passed through the proceedings, I have seen no any admission of

any charged offence, now since there was no such admission, it was expected for the applicant to prove all the allegations by evidence, failure or ignoring to do so, is failure to discharge one's duty, as casted by section 39, of Cap 366 R.E 2019. Further to that, some of the receipts were allegedly issued by the known institutions, for instance Gisani Hospital, from which no witness was called to come and disprove the said receipt as being genuine. It is the celebrated principle as propounded in the case of **Azizi Abdallah v Republic** [1991] TLR 71 at page 72 as relied on by the same Court in the case of **Mashimba Dotto @ Lukubanija** vs **The Republic,** Criminal Appeal No. 317 of 2013 CAT, Mwanza

> *"The general and well known rule is that the prosecutor is under a prima facie duty to call those witnesses who, from their connection with the transaction in question, are able to testify to material facts. If such witnesses are within reach but are not called without sufficient reason being shown, the court may draw an inference adverse to the prosecution."*

In the case at hand, as the applicant failed to call the witness who allegedly issued the receipts whom had they been called, they would have resolved the unresolved doubt as to whether the said receipt were genuine or not. That said, I find this to be a fit case in which the court can make adverse inference that the applicant without reasonable cause failed to

tender the documentary evidence which would have proved that there was such misconduct, and failed to call important witnesses who would have proved the allegations of the ingenuiness of the document. Therefore they failed to prove the valid reasons for terminating the respondent.

Regarding the issue as to whether the procedure for terminating the respondent was followed, under this head, the applicant framed two issues as follows; namely whether or not the termination letter was written before the recommendation of termination of employment of the respondent by the disciplinary hearing committee. This issue needs not take my time, as the record is clear that, the recommendation of the hearing committee was made on the last day of hearing that is on 30/08/2018 and the termination letter was written on the same date. Therefore the CMA misconceived the record in holding that the termination was made before the recommendation of the hearing committee. Whether or not the respondent was given right to be heard in the appeal stage is some thing which I do not find merit in either.

Now having found that, the applicant did not prove the reasons for termination, other issues die naturally, therefore the Arbitrator was justified to hold that the termination based on invalid and unfair reasons.

Having so found, the next issue is issue number four whether the Arbitrator properly after holding that the termination was unfair the reinstatement was the appropriate remedy. This issue should also not involve me as the parliament in its wisdom had anticipated this kind of situation, and under section 40(3) of the Employment and Labour Relations Act, (supra) which provide that;

> *"40(3) Where an order of reinstatement or re-engagement is made by an arbitrator or Court and the employer decides not to reinstate or reengage the employee, the employer shall pay compensation of twelve months wages in addition to wages due and other benefits from the date of unfair termination to the date of final payment"*

Therefore if the applicant does not for any reasons want the respondent back to work, he may invoke the above cited provision for paying the respondent the compensation in terms of section 40(3) of the Employment and Labour Relations Act, cited above.

In fine, I find the application to have no merits, it is hereby dismissed for the reasons given.

It is accordingly ordered.

DATED at **MWANZA** this 09th day of August, 2021

J. C. TIGANGA

JUDGE

09/08/2021