IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

REVISION APPLICATION NO. 62 OF 2020

((Original CMA/ARS/262/19/147/2019)

GIVEN KESSY ..... APPLICANT

Versus

SOS CHILDREN'S VILLAGE TANZANIA ..... RESPONDENT

JUDGMENT

09/08/2021 & 11/10/2021

GWAE, J

In the Commission for Mediation and Arbitration of Arusha at Arusha, the applicant, **Given Kessy** complained against his employer now the respondent, ~~**SOS Children Village** on unfair termination connected with alleged misconduct.~~ The applicant complained to have been unfairly terminated. He therefore sought to be paid his terminal benefits.

The Commission (CMA), through its award dated 23rd July 2020, was of the view that, since the applicant had admitted the disciplinary offences leveled against him, therefore, there was no legal requirement to conduct investigation nor was it necessary proceed with disciplinary hearing. The learned arbitrator

finally held that, the applicant was substantively and procedurally terminated from his employment. Consequently, his complaint was entirely dismissed.

Dissatisfied with the award of the Commission, the applicant has brought this application for revision under the provisions of Section 91 (1) (a), (2) (a), (b) and (c) of the Employment and Labour Relations Act, No. 6 of 2004 (Act), Rules 24 (1), (2) (a), (b), (c), (d), (e), (f), (3) (a), (b), (c) and (d), 28 (1) (a), (c), (d) and (e) of the Labour Court Rules, GN No. 106 of 2007, praying for an order of the court in the following terms:

1. That, this court be pleased to call the records of the CMA in dispute reference CMA/ARS/262/19/147/19 so as to examine the records, proceedings and the award of the Commission so that this court could satisfy on the legality and propriety, logical and rationality of the findings and whole decision of the arbitrator in the following grounds;

    (i) The arbitrator erred in law and fact by failing to address and determine the pertinent and focal issue in dispute that is whether the procedure for terminating the complainant was fair despite raising the issue at the biggening of the award

    (ii) The arbitrator erred in law and fact by holding that the complainant be denied repatriation and severance allowance pay without on record and legal justification

    (iii) The arbitrator seriously erred in both law and fact for being bias against the complainant and giving decision

based on personal sentiments without evidence to support the assertion

Brief background of this dispute is as follows, that, the respondent is an organization dealing with social services and welfare of the children operating in the various Tanzania Regions. That, the applicant was initially employed by the respondent on the 1st June 2010 as a social worker for the term of two years and he continued working with the respondent till on the 1st June 2018 when worked with her in the capacity of a Program Officer.

However, on the 11th day of April 2019 the applicant's employment was terminated on the ground of misconducts namely; **first,** gross negligence which led to loss of the respondent's motorcycle which was allegedly stolen on the 12th March 2019 at the applicant's residence, **second,** unauthorized use of the respondent's motorcycle and **third** offence, failure to follow instruction of the Organization working rules and directives. The Disciplinary offence heard and determined the charge against the applicant. Aggrieved with the decision of the Disciplinary Hearing Committee, the applicant referred the dispute to the CMA which was duly admitted on the 13th May 2019.

As earlier alluded, the applicant was not pleased with the termination of his employment, he subsequently brought this application by way of a Notice of application and chamber summons accompanied by his sworn affidavit. The respondent, on the other hand, strongly resisted this application through his

counter affidavit stating that, the impugned award was properly procured. She therefore prayed this application be dismissed in toto for lack of merit.

On the 28th June 2021 the applicant appeared in person and **Mr. Erick Stanslaus,** the learned advocate appeared representing the respondent, sought and obtained leave to dispose of this application for revision by way of written submission.

Herein after I shall take consideration of the parties' written submissions while determining each ground for revision as raised by the applicant and quoted herein above. Starting with the 1st ground which reads;

> **That, the arbitrator erred in law and fact by failing to address and determine the pertinent and focal issue in dispute that is whether the procedure for terminating the complainant was fair despite raising the issue at the *biggening* of the award**

It is trite law that, each and every issue framed immediately before commencement of trial or arbitration or added in the course of the trial must be determined by an adjudicator basing on evidence before him or her. According to the applicant, the respondent was bound to satisfy the Commission that, she unliterally terminated the applicant's employment after observance of substantive law and that the Commission was to ascertain if there was procedural fairness or otherwise instead of completely omitting to address that pertinent and crucial issue. The applicant strongly contended that there were largely violations of

termination procedures such as failure to conduct the statutory investigation and failure to avail the applicant with disciplinary report which was also not signed by him. He cited Rule 8 (1) & 9 (1) of the Employment and Labour Relations Act (Code of Good Practice), G. N 42 of 2007 ("Code") and Section 37 (2) of the Employment and Labour Relations Act, Cap 366 Revised Edition, 2019 ("Act").

On his part, the respondent's counsel argued that, there was investigation followed by a letter addressed to the applicant and his reply letter thereto (DE3) admitting the offences, the applicant's admission which caused the respondent abstain to further conduct investigation. Thus, according to the respondent there was a clear ground for initiating the disciplinary hearing against the applicant. He further argued that, the termination procedures were observed as stipulated by the Act and the Code adding that, the learned arbitrator did clearly and vividly address the procedural issue at page 11 and 13 of the impugned award as opposed to the applicant's assertion.

Examining the labour laws, the CMA's award and parties' submissions, I am of the considered view that, procedural fairness is one of the significant aspects in determining whether termination of employment of an employee was fair or otherwise though termination procedures should not be checked in a cause list mode but the same must be significantly adhered to by an employer before his or her unilateral termination of a contract of employment (See section

37 (2) and 39 of the Act and Rule 13 of the Code as well as International Labour Organizational (ILO) Conversion No. 158 of 1982).

In our instant case, it seems clearly that the arbitrator skipped determining or addressing the procedural aspect on the perception and guidance of this court with effect that, once an employee admits to have committed a disciplinary offence, the requirement of the termination procedures automatically ceases. He then made reference to the case of **Nickson Alex v. Plan International**, Revision No. 22 of 2014 and **Grumenti Reserves Ltd v. Beno Njovu**, Revision No. 15 of 2013 (both unreported- HCLD) where it was held that even if the employer did not conduct disciplinary hearing, the position would remain the same as the applicant plainly admitted the disciplinary offence that he was alleged to have committed.

As the CMA in its finding in this aspect heavily relied on the alleged applicant's admission, I should therefore traverse on the said admission in the applicant's reply letter dated 19th March 2019, the letter reads;

> "....I will reply three issues collectively as the all refer to same thing that is gross negligence....first and foremost, I must state that since the referred motorcycle with Registration no. MC. 670 ANC handled over to me almost five years ago I have been using it careful in only official duties... Basing in this I deny 2nd issue.....I am quite sure that there is no negligent (sic) on my part as since the said motorcycle was handle (sic) to me I use to park it

my home compound and your office is aware of that fact and no any time the management including your office question this fact which is the fact best known to it.
That, on the night of 12/3/2019, the said motorcycle was stolen by unknown people.....I am very apologetic for what happened. However, I wish to state that, there is no any negligence (sic) act on my part as alleged in your letter ...please find the attached copy of the RB for easy of your reference".

Carefully looking at the nature of the applicant's reply letter (DE3) partly reproduced herein, I am not quietly persuaded if the applicant had clearly and undisputedly admitted the disciplinary offences leveled against him unless there is an express admission in other pieces of evidence. The applicant through DE3 clearly denies to have committed the said three offences on the ground that, **firstly;** that, he was lawfully handed over the property, **secondly**, that, he used to park it at his compound since he was formally handed over (more than four years that is since 2014 to 2019), the fact known by his employer and **thirdly,** that, he was not negligent. According to the said reply letter, the applicant was not negligent. In other words, the applicant admitted an occurrence of theft of his employer's property which was in his possession to have occurred in his premises but seriously disputed the offence of gross negligence, unauthorized use of the motorcycle as well as well as being acquainted with the rules of his employer.

Therefore, it is my firm view that, the alleged applicant's admission was seriously doubtful, ought not to be considered or relied as a legal admission of the said offences. The applicant's admission in question is now considered as being equivocal plea of guilty to the disciplinary proceedings. I am saying so simply because the applicant patently denied the offences just like in a criminal charge where a plea is found to be equivocal where a court of law cannot proceed with a conviction and sentence against an accused person relying on such plea. Accordingly, I find thus the judicial decisions **Nickson Alex vs. Plan International** (supra) Revision No. 22 of 2014 and **Grumenti Reserves Ltd vs. Beno Njovu** (supra) cited by the respondent's counsel to be distinguishable from the instant dispute as the words used by the applicant in his reply letter (DE3) do not clearly constitute an admission of the said disciplinary offences. It follows therefore the learned arbitrator misdirected himself when treated the applicant's reply letter (DE3) as an admission of the disciplinary offences. Correspondingly, it was wrong for the employer to abstain from conducting the requisite investigation on the basis of the said admission.

I have further looked at the evidence adduced by the applicant during arbitration and observed that, he similarly denied to have been negligent in the loss of the respondent's motorcycle. Basing on the foregoing reasons, the 1st ground for revision is therefore merited.

In the 2nd ground to wit; **the arbitrator erred in law and fact by holding that the complainant be denied repatriation and severance allowance pay without on record and legal justification.**

In ordinary sense, the applicant has conspicuously, when cross examined, failed to orally prove that he was recruited in Dar salaam Region as argued by the respondent particularly when he was cross examined by the respondent's counsel where he vividly answered that he was issued with the contract of employment in Arusha (See page 53 and 59 of the typed proceedings). Equally, when he was re-examined by his counsel (Mr. Matuba Nyirembe), his reply was to the effect that, he was employed in Arusha, these pieces of evidence are depicted from the typed proceedings at page 63 as reproduced herein;

S: uliajiriwa wapi kwa mjibu wa mkataba
J: Arusha
S: Kwa hiyo uliajiriwa Arusha
J: Ndiyo

Nevertheless, it is evidently clear that the applicant was employed by the respondent since 2010 and considering the fact that, there is no proof on the part of the respondent establishing that at a certain point in time the parties' contract of employment came to an end except that the applicant had been continuously in the contract of employment with the respondent.

I have also carefully considered the fact that, the applicant was employed in Dar es salaam Region is more established by the respondent's own document (contract of employment-DE1) which is to the effect that the applicant, Given Kessy was formally employed by the respondent effectively from 1st June 2018 to 30th day of May 2019. More so, both parties have admitted to have entered into the contract of employment on the 1st June 2018 whereas in the contract of employment attached by the applicant in the name of **Given Japhet Kessy**, is indicative that the contract of employment was of 1st August 2019 ending on the 31st July 2019 and place of recruitment is Arusha.

Had an attachment been a document to be relied by the court, a finding of the court could have been different for an obvious reason that, the applicant himself attached the contract of employment commencing from 1st August 2018 which indicates that the place of recruitment is Arusha.

Since the respondent is responsible in keeping documents and since she was the one who produced the contract (DE1) and through their opening statements there is no dispute that the applicant was employed effectively from 1st June 2018. The words "uliarijiwa wapi" was probably perceived by the applicant to mean that his place or station of work. It follows therefore, it was a misdirection on the part of the arbitrator to hold that the applicant's place of recruitment was in Arusha Region without considering the parties' opening

statements and DE1 produced by the respondent. The applicant is thus entitled to severance pay pursuant to section 42 of the Act and repatriation allowance as per section 43 (1) (c) of the Act (supra) which reads;

> "(c) Pay the employee an allowance for transportation to the place of recruitment in accordance with subsection (2) and daily subsistence expenses during the period, if any, between the date of termination of the contract and the date of transporting the employee and his family to the place of recruitment"

See also a decision in **Attorney General v. Ahmad R. Kakuti and two others**, Civil Appeal No. 49 of 2004 (unreported-CAT)

Basing on the respondent's document (DE1) and reasons given herein above, consequently, this ground is not without merit.

> In the last ground, **the arbitrator seriously erred in both law and fact for being bias against the complainant and giving decision based on personal sentiments without evidence to support the assertion**

Examining the records particularly the award, I am not able to hold that the arbitrator is biased as no express evidence to justify this court hold that the arbitrator was biased.

Consequently, this application is granted, the CMA's award is revised and set aside. The applicant is entitled to his salaries for the remaining period of his

contract that is from date of termination (11th April 2019) to 30th May 2019 and payment of repatriation costs and subsistence allowance which is equal to one month's salary from the date his contract of employment would come to an end (30th May 2019) to the date of repatriation, this matter is labour where costs are exceptionally granted, I thus refrain from making an order as to costs.

It is so ordered.

HIGH COURT OF TANZANIA

M. R. GWAE
JUDGE
30/08/2021