IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT ARUSHA

APPLICATION FOR REVISION NO. 41 OF 2019

(Original Dispute CMA/ARS/ARB/185/2017)

SUNKIST BAKERY LTD ---------- APPLICANT

VERSUS

GEORGE MKILINDI ---------- RESPONDENT

JUDGMENT

16/09/2021 & 11/11/2021

KAMUZORA J,

In the Commission for Mediation and Arbitration of Arusha (CMA), **George Mkilindi** (the respondent herein) filed his labour dispute vide CMA/ARS/ARB/185/2017 against his employer **Sunkist Bakery Ltd** (the applicant herein) claiming that he was unfairly terminated from employment.

Having considered the evidence from the parties and exhibits tendered before it, the CMA in its award delivered on 10th May 2019 made a decision that, there was a slight procedural unfairness in the termination of the respondent's employment. The CMA exercised its

discretion under section 40(1) (c) of The Employment and Labour Relations Act and ordered the applicant to pay the respondent, three months' salary to the tune of Tshs. 1,020,000/= as a compensation. Being dissatisfied with the CMA award the applicant preferred the present application on the following reasons: -

1) *That, the award of the Arbitrator was unlawful, illogical, irrational and irregular for failure of the arbitrator to state basis of awarding three months compensation to the respondent.*
2) *That, the award of the arbitrator was unlawful, illogical, irrational and irregular for failure on the part of the arbitrator to state the slight procedural unfairness.*
3) *That, the award of the arbitrator was unlawful, illogical and irrational and full of irregularities for issuing reliefs which are not proved during the proceedings.*
4) *That, the award of the arbitrator was unlawful illogical, irrational and irregular for failure of the arbitrator to make the finding that the procedure was properly followed.*

Before delving into what was argued by the parties in respect of the revision, it is resourceful to demonstrate the facts of the case leading to this application, albeit briefly.

The respondent was employed by the applicant in his company as an electrician. On 22/06/2017 the applicant issued to the respondent the termination letter (Exhibit D9) following the disciplinary hearing

conducted on the allegation of the misconduct committed by the respondent. It was alleged that, the respondent committed misconduct by going out of the workplace before time, not going back to workplace on time and not punching/signing while leaving and entering the work premises.

The CMA agreed that the reasons for termination were fair but there was a slight unfairness on the procedures for termination and pointed that the said unprocedural emanated from Exhibit D7. The applicant was ordered to pay the respondent three months salary to the tune of Tshs 1,020,000/=, the award which is now the subject of this revision.

The application is supported by affidavit deponed by Alan Lugendo the Administrative Manager and Human Resource Officer of the applicant. The application was strongly opposed through counter affidavit deponed by the respondent. Hearing of the application was conducted orally, and the applicant enjoyed the service of learned counsels; Mr. Qamar and Mr Geofrey Mollel while the respondent was represented by Mr. Augustine Masatu, personal representative.

The major issue calling for this court determination is *whether the procedures for termination were complied with.*

Arguing in support of the application Mr. Qamara invited this court to consider the Employment and Labour Relations (Code of Good Practice) GN No. 42/2007. He submitted that, the law contains two things which must be considered by the arbitrator in making decision.

First, that, in termination of employment the arbitrator has to ensure that the **reason** for termination is fair as per Rule 12(1) (a) b (i) (ii) (iii) (iv) and (v) 12 (2) 12 (3) (a) (b) (c) (d) (e) (f) and rule 12 (4), (a) (b) and 12 (5) of the Employment and Labour relations (Code of Good practise) GN No. 42 of 2007. Second, that, the **procedures** for termination must be fair as required under rule 13(1) (2) (4) (5) (6 to 13) of the Employment and Labour relations (Code of Good practise) GN No. 42 of 2007.

While Mr. Qamara agreed with the CMA finding on fairness of the reasons for termination, he disagreed with the CMA finding that the procedures for termination were unfair and the award of three months salary. He was of the view that, the arbitrator failed to state which procedural unfairness that he was referring to. While the arbitrator referred the incorrectness of Exhibit D7 item 8 Mr. Qamara was of the view that, the recording of the hearing form before the CMA is not a procedural issue as it is not covered under the rules 13 (1) to (13). He

insisted that, under exhibit D1 the respondent denied being responsible for the charges and it was so recorded in the hearing form. Mr. Qamar contended that the arbitrator raised the issue that there was slight procedural unfairness on his own and without giving chance to the parties to address the same. He maintained that the arbitrator did not show which procedure was not complied with and thus prayed for the CMA award to be revised.

In contesting the application Mr. Augustine, the respondent representative submitted that, the hearing form (Exhibit D1) used by the applicant had 5 errors. He pointed out that, the respondent was not heard by the employer in compliance with the procedures for termination. That, the employee was not issued with form 3 and form D and that the procedure under Rule 4(14) GN 42/2007 was not complied with. He cited the case of **Night Support Tanzania Ltd v Yahaya & others,** Revision No. 106/2015 and **Sospeter Nyeura Naregeri v. The permanent secretary central establishment & 2others**, Civil Appeal No.54/2001 to support his argument on the rules of natural justice and Article 13(1) (6) (a) of the Constitution on the right to be heard. He insisted that, since the respondent was not heard, the award

be set aside and the respondent be counted as employee from the date the CMA decision was made.

In his rejoinder submission Mr. Qamar argued that, the respondent brought up new issues of disciplinary hearing which was not among the grounds of revision. He submitted that, the raised issue was not dealt with at the CMA as the respondent did not complain before CMA that form 3 was not responded to. That, the same cannot be brought at the revision stage. Mr. Qamar insisted that, the right to be herd was not among the grounds of revision but the same was still complied with under form No 1 and before the CMA as per its proceedings and award. Mr. Qamar reiterated his submission in chief that the award did not show what slight unprocedural issue that was contrary to Rule 13 of GN 42. He insisted that, the award of three months salary was without any justification and prayed for the same to be quashed and set aside.

In determining the issue on whether the procedure for termination was fair, this court is much aware of the provision of section 37(2) (c) of The Employment and Labour Relations Act, 2004. The section requires the termination of employment to follow the laid down procedures for termination which are well laid down under Rule 13(1) to (13) of the

Employment and labour Relations (Code of Good Practise) Rules G.N No 42/2007.

There is no doubt, and it was well started by the CMA that the reasons for termination was fair and complied with the law. It is not disputed that, the respondent was paid all his terminal benefits after termination. However, the arbitrator formed a view that there was a slight procedural irregularity in recording the respondents defence in the hearing form. The arbitrator started that, by recording that the respondents denied all the allegations, the disciplinary hearing committee was wrong as it was supposed to record the summary of defence in active voice and not putting words in the mouth of the respondent. The CMA considered this as irregularity strong enough to amount to the award of three months' salary.

I do not agree with the conclusion made by the CMA for the following reasons: **one**, there is no claim for any unpaid salary or benefit that was raised by the respondent. The respondent's claim before the CMA was for reinstatement order and the CMA was satisfied that the respondent could not be reinstated as the reasons for termination were fair. **Two**, the CMA did not state categorically the provision that was infringed by the disciplinary committee which gives

the mode of recording the evidence. I will assume that the arbitrator was referring the provision of Rule 13 of the Employment and labour Relations (Code of Good Practise) Rules G.N. No. 42/2007 which deals with fairness of procedures for termination. The same require the employee to be given opportunity to respond to the allegations. Exhibit D7 part 8, was recorded in a manner showing that the employee denied all the allegations. My understanding from that exhibit is that, the respondent was asked by the disciplinary committee on his response to the allegations and he denied the allegations the fact which even the respondent do not dispute as he is until now denying the allegations. Thus, not recording the same in passive voice as raised by the CMA did not in any way prejudiced the respondent and if so, the CMA could have pointed out how the respondent was prejudiced by that mode of recording. The respondent attended the hearing and as per exhibit D7, the hearing was conducted in his presence and in the presence of his representative from FIBUCA. This implies that, there was a free and fair trial at the disciplinary hearing committee.

The decision made after the hearing was communicated to the respondent and signed by him as well evidenced by exhibit D7. The respondent preferred an appeal, and the outcome of the appeal is

evidenced under exhibit D8. The respondent was issued with a termination letter which provided among other things the reasons for his termination and his entitlements thereafter as evidenced under exhibit D9. Therefore, based on the above analysis it is crystal clear that, in the circumstance of this matter, the termination procedures were followed. While noting the authorities cited by the respondent's representative **Night Support Tanzania Ltd** (supra) and **Sospeter Nyeura Naregeri** (supra) on the right to be heart and rule of natural justice, I do not agree with the contention that the respondent was denied a right to be heard. Based on the above reasoning it is my settled mind that the respondent was accorded a right to be heard and he was fairly terminated.

~~In the result, I find this application to have merit and is allowed.~~ The Arbitrator's award of three months salary to the respondent as compensation for unfair termination was not justified. I therefore quash and set aside the Arbitrators award. Considering the circumstance of this case no order for costs is made.

DATED at **ARUSHA** this 11th Day of November 2021

D. C. KAMUZORA

JUDGE