IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

LABOUR REVISION NO. 53 OF 2020

(Originating from Labour Dispute No. CMA/ARS/ARS/160/2019)

NEW HOPE INITIATIVE.....APPLICANT

VERSUS

AMINA MHINA.....RESPONDENT

JUDGMENT

04/10/2021 & 13/12/2021

GWAE, J

The applicant, New Hope Initiative has filed this application for revision against the award of the Commission for Mediation and Arbitration (to be referred to as CMA hence forth) issued in favour of the respondent one Amina Mhina. This application is moved by a notice of application, chamber summons and an accompanying affidavit duly sworn by one Robert Mwindulwa Byemba, the principal officer of the applicant where reasons for this application are contained, namely;

(a) That, the arbitrator erred in law by condoning late referral of the matter without reasonable cause

(b) That, the arbitrator erred in law by ruling that the respondent was not entitled to tender and rely on the documents filed on the 18th February 2020

(c) That, the arbitrator erred in law in hearing the dispute in the absence of the applicant's representative while he was duly notified of such absence

(d) That, the arbitrator erred in law in issuing the summons on 18th April 2020 to appear on the 19th April 2020

(e) That, the arbitrator in law by holding that the respondent was not accorded right of being heard

(f) That, the arbitrator erred in law by holding that the respondent's acts of engaging in criminal transactions and being sentenced to jail was good cause for not attending the Disciplinary Hearing.

(g) That, the arbitrator erred in law by awarding Tshs. 6,400,00 (sic)

The respondent initially was represented by Mr. Samwel from TUGHE, despite the filing of the counter affidavit, neither Mr. Samwel nor the respondent showed up to defend her case when the same was called on for hearing, thus this applicant was heard ex parte.

The applicant was represented by the learned counsel Mr. Muhamadou Evarist Majura who orally argued his application that, had the CMA addressed on the issue of admission by the respondent on the committed offences it

would have not arrived at the conclusion that the respondent's termination of employment was both substantive and procedure unfair.

The applicant's counsel also remarked that, the CMA unjustifiably granted condonation to the respondent in the absence of the requisite sufficient cause. He further argued that, it was inappropriate for the CMA to deny the admission of the applicant's additional documents despite the fact that notice to produce additional document was issued accordingly. Basing on this argument the counsel urged this court to grant the application and set aside the award.

Considering the submission by the applicant's counsel together with the court's records, I therefore find that, the first issue to be determined by the court is;

Whether the CMA was justified to grant condonation to the respondent.

I have thoroughly gone through the record of the CMA even though I have not come across the proceedings for the hearing of the condonation nevertheless the ruling which granted the condonation is in place, I have thus carefully read it and found that, the CMA'S Arbitrator justifiably granted the condonation on reasons to follow.

The history of this dispute being that, initially, the respondent filed her complaint to the CMA on the 9th September 2017 however following the preliminary objection raised by the applicant the complaint was struck out with leave to re-file it within 14 days. The respondent filed another complaint and again the applicant raised a preliminary objection that the same had not been condoned, in reply the respondent argued that the former dispute was struck out with leave to re file within 14 days, Therefore, she was not out of time. Yet, the respondent's complaint was again struck out on reasons that, the respondent had not attached a ruling which allowed her to refile her complaint within 14 days.

Persistent to pursue her rights the respondent filed another dispute together with an application for condonation where she stated that, the reason for delay to refer her complaint was caused by failure to obtain the copy of the ruling on time. In granting the condonation the Arbitrator was of the view that since the original complaint was filed on time the delay is not inordinate and the respondent's failure to obtain the copy of the ruling within time was beyond her control.

Having given an account of what transpired, it is my considered view that, inordinate delays should be distinguished from technical delay where a

part had previously filed his/her complaint/suit within time but on account of technicalities, the court or quasi-judicial bodies should judiciously exercise their statutory discretion in granting extension of time whenever the same is sought. Reference to this finding is made from the famous case of **Fortunatus Masha vs. William Shija & another** [1997] TLR 154 where the Court of Appeal of Tanzania stated that;

> "..I am satisfied that a distinction should be made between cases involving real or actual delays and those like the present one which only involve what can be called technical delays in the sense that the original appeal was lodged in time but the present situation arose only because the original appeal for one reason or another has been found to be incompetent and a fresh appeal has to be instituted. In the circumstances, the negligence if any refers to the filing of an incompetent appeal not the delay in filing it. The filing of an incompetent appeal having been duly penalized by striking it out, the same cannot be used to determine the timeousness of applying for filing the fresh appeal."

Basing on the above jurisprudence, it follows that the arbitrator was justified in condoning the dispute. It should also be borne in mind that, with the advent of the principal of overriding objective, courts are seriously urged to dispense with legal technicalities and focus on substantive justice. That

being said. Accordingly, I hold that, the grant of condonation of the respondent's dispute was with sufficient cause contrary to the assertations by the applicant's counsel.

Now, the court has to discuss on whether the applicant was accorded a proper right to be heard.

In the first place Mr. Majura complaint is that he was denied to tender documents which were filed in the list of additional documents which he claimed to be very vital documents. The learned counsel also complained that on two occasions his witness one Filbert Jeremia who is also a principal officer of the applicant was denied right to be heard as his advocate was indisposed and consequently the matter proceeded ex parte. In her counter affidavit the respondent stated that, the alleged additional documents were filed by the applicant on the 18th February 2020 a day before hearing of the matter. It was in that premises, the applicant was subsequently denied by the Commission to use the said documents as the respondent did not get a chance to go through them.

Regarding this complaint, I have revisited back the proceedings of the Commission and observed that, what is complained by the applicant is not supported by the records. First, the applicant was not denied right to be

heard as he alleges simply because the records reveal that on 14/04/2020 the matter was adjourned till 27/04/2020 at 09:30 am and 29/04/2020 at 09:30 am as the applicant's representative had problems. On 27/04/2020 Mr. Mutabazi advocate appeared for the applicant herein and again he sought for adjournment of the matter as he was bereaved. The Commission then adjourned the matter to 18/19 May 2020, however on the fixed date the applicant never appeared and it is when the Arbitrator closed the applicant's case and the respondent gave her defence. From what has been stated it is clear that the applicant here was accorded right to be heard and in essence, the Commission is found to have been patient with several unnecessary adjournments which were sought by the applicant only to enable him to bring his other witness to testify.

As to the complaint that, the applicant was denied a right to rely on the list of additional documents that he filed on 18/02/2020.

Having examined the CMA' record, I am of the view that, this issue was well accordingly dealt with by the Arbitrator. More so, I do not find any miscarriage of justice to the applicant as the same were considered by the Commission in giving its award. From the records the applicant presented his additional list of documents on 18/02/2020 and on 19/02/2020 the

matter was fixed for hearing; the respondent raised her concern with regard to the filing of the additional documents. In its short ruling the Arbitrator referred the parties to Rule 24 of the Labour Institutions (Mediation and Arbitration Guidelines) Rules. G.N 67 of 2007 which provides for the essence of notice to filing a list of additional documents earlier so that both parties to have an opportunity to go through them. The Commission then proceeded with the hearing of the matter however with a caution that, it will consider the said documents if it thinks fit.

In relation to the issue as to whether the applicant had valid reasons for terminating the respondent's employment.

This does not need to detain me much as the there is ample evidence that, the respondent admitted to have committed several misconducts via her letter of apology dated 24th May 2017 (DE2). When I carefully look at the respondent's letter and the offence alleged to have committed 10th May 2017 and 22nd May 2017, I am therefore persuaded that the applicant had reason to terminate the respondent.

Basing on the letter of apology by the respondent, I find that there was clear evidence to prove the disciplinary offences against the respondent this court is left with no other option than to revise the arbitrator's decision

on the aspect of valid reason for the termination, it is therefore revised and set aside.

Now turning to the issue on, whether or not applicant's termination was procedurally fair,

Mr. Majura faulted the CMA award holding that the respondent was not accorded the right to be heard because there was no disciplinary hearing conducted by employer during the termination of the applicant. According to him the respondent had no sufficient cause for her failure to attend the disciplinary hearing.

The right to be heard is so fundamental and is a constitutional right provided under Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977 amended from time to time. The same right is also provided under section 37 of the Employment and Labour Relations Act, Cap 366 R. E, 2019. However, the above right can be exercised only where employee is available; and if the employee deliberately refuses or on the other circumstances he or she declines to appear or is precluded to appear on the disciplinary hearing then the law under Rule 13 (6) of the Employment and Labour Relations (Code of Good Practice) GN No. 42 of 2007 allows employer to proceed with the hearing in the absence of the employee (See

the decision in the case of **Mathias Petro v. Jandu Construction & Plumbers, Lab.** Div., DSM, Revision No. 175 of 2014).

What is important to be observed by the court is whether the respondent failed to appear to the hearing for the reasons out of her control or on what circumstances prevented the respondent from attending the disciplinary hearing. I am saying so simply because I am aware that there are employees who with no good reasons refrain from attending disciplinary hearing. It is vividly in the matter at hand that, the respondent could not attend the disciplinary hearing on reasons that a day before the conduct of the disciplinary hearing she was apprehended at the police station and she tendered exhibit P5 which is the RB number, she was later on taken to the court and as she failed to secure bail. She was therefore taken to prison. Substantiating her assertions, she tendered exhibit P7 (accused's number). Her evidence is further that she was acquitted on 12/07/2017 and it is when she went to report to the applicant where she was handed with the termination letter. Given an account of what transpired, it is the firm view of this court that it was inappropriate and unjustifiable for the applicant to have proceeded with the disciplinary hearing in the absence of the respondent taking into account that she was prevented to attended with circumstances

which were beyond her control and in any way, she could not have passed such information of her absence to the applicant. Prudently, it was expected of the applicant to have adjourned the hearing to ascertain as to why the applicant did not attend the disciplinary hearing, and upon being satisfied that the respondent has no sufficient cause to attend the disciplinary hearing then the applicant under Rule 13 (6) of G.N. No. 42 of 2007 would proceed with the hearing or alternatively, after the applicant being shown a proof as why the respondent would not attend the Disciplinary Hearing, the applicant would set aside, the termination and re-hearing the disciplinary offences against the respondent. It is under these premises; I find myself compelled to uphold the award of the CMA that, the respondent's termination was procedurally unfair following the facts that she was not afforded a right to be heard before the disciplinary hearing.

Lastly, That, the arbitrator erred in law by awarding Tshs. 6,400,00 (sic)

As elucidated herein above, there was a valid reason for termination, thus, the finding and subsequent order of compensation would have been upheld if the misconducts admitted by the respondent were not gross misconduct such theft. In the premises, I am therefore inclined to observe

the principle that, once an employee admits to have committed a disciplinary offence, the requirement of the termination procedures automatically ceases unless the admitted disciplinary offences are minor. In **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 offences that he was alleged to have committed.

Having found that the respondent's termination was substantively fair and taking into account it was based on the admitted gross misconducts, this application is therefore partly granted. The CMA award is faulted to the above to the above extent. This matter being a labour dispute, I shall not therefore make an order as to costs.

It is so ordered.

M. R. GWAE
JUDGE
13/12/2021