IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT ARUSHA

REVISION APPLICATION NO. 63 OF 2021

(Originating from employment dispute No. CMA/ARS/ARS/238/2019)

BERTHA PHENIAS LWAKATARE ..... APPLICANT

VERSUS

HEARTS & HANDS FOR HUMANITY ..... RESPONDENT

JUDGMENT

02/06/2022 & 21/07/2022

KAMUZORA, J.

The Applicant Bertha Phenias Lwakatare being aggrieved by the award issued by the Commission For Mediation and Arbitration (CMA) brought this application under the provision of section 91(l)(a), (2)(b) and (c), section 94(1)(b)(i) of the Employment and Labour Relations Act 2004 and Rule 24(l), (2)(a),(b),(c),(d),(e),(f), 24(3),(a),(b),(c),(d), 28(l),(c),(d),(e) of the Labour Court Rules. The Applicant is seeking for this court to invoke its revisional powers and call for the records of the CMA in CMA/ARS/ARS/238/2019 and set aside the arbitrators award dated 30th June 2021.

The back ground of the matter as may be depicted from the record is such that, the Applicant was employed by the Respondent as a Vice President of the Respondent, a US based NGO since February 2018. That, while in the course of her employment on mid of April 2019, the Respondent gained interest to the Applicant's motor vehicle make Toyota Prado with registration No. T. 967 CYY and made an approach to the Applicant with the intention of buying the said motor vehicle from her for a consideration of Tshs 24,620,000/=.

That, the parties concluded a written agreement on 24th April, 2019 and the Applicant handled over the original registration cards to the Respondent whom while in the process of transferring the ownership names of the said motor vehicle at the TRA, the Applicant decided to file a letter to the TRA to block the said transfer claiming that the Respondent had not paid her the consideration amount.

It was for that reason that the Respondent summoned the Applicant to attend to a disciplinary hearing for a claim of misconduct which led to her employment termination. The Applicant complained against the Respondent at the CMA and raised the argument that the procedure for termination was not followed by the Respondent hence a claim of US Dollars 16,639 arising out of the unfair termination.

During the hearing of the complaint at the CMA, the Applicant was the only witness and tendered exhibit P1 (Memorandum of understanding), exhibit P2 (Motor Vehicle sale agreement), exhibits P3 (notice to show cause), exhibit P4 (a response to letter to show cause), exhibit P5 (termination letter). The Respondent herein presented four witness and two exhibits were tendered that is, exhibit D1 (notice of intention to show cause), exhibit D2 (disciplinary hearing minutes). The decision by the CMA was to the effect that the Applicant was lawfully terminated from her employment. Being aggrieved by the CMA decision, the Applicant preferred this revision application on four reasons as follows: -

1) *That, the trial arbitrator erred both in law and fact by holding that stopping the transfer of motor vehicle for want of payment of consideration amounted to dishonest.*
2) *That, the trial arbitrator erred both in law and fact by basing his decision on personal thoughts instead of available evidence and provision of the laws.*
3) *That, the trial arbitrator erred both in law and fact by holding that the Respondent terminated Applicant on substantive reason and fair procedure was followed.*

When the application came up for hearing, the Applicant was ably represented by Mr. Sabato Ngogo, learned advocate, while the

Respondent enjoyed the service of Mr. Silvester Kahunduka, learned advocate. Hearing of the application was done orally.

Submitting in support of the first ground, the Applicant's counsel argued that, by relying on exhibits D2 and P2 and going through the proceedings of the trial tribunal the only issue which led to the institution of the labour dispute was the act of the Applicant stopping the transfer of a motor vehicle after the purchase amount not being paid to her. That, reading the whole exhibits D2 there is nowhere that the Respondent tendered evidence supporting the allegation that they paid the Applicant. That, Rule 13 (5) of the Employment and Labour Relations (Code of good practice) Rule of 2007 requires the evidence in support of the allegation against the employee to be presented at the hearing and the employee to be given an opportunity to respond to it. That, as per exhibit P2 which is a vehicle sale agreement on consideration clause, he argued that, it was mutually agreed that the amount of consideration was to be paid upon execution of the agreement that is, after executing the agreement.

The Applicants counsel went on and submitted that, reading at page 18 of the typed proceeding, one Julius Karata said that the Applicant was paid in terms of dollars the same as DW2. That, the same

varies with the what has written in exhibit P2. He added that, since there is no any tangible evidence indicating that the Applicant was paid the amount as per the agreement it cannot be said that the Applicant was paid and that it was wrong for the arbitrator to hold that according to exhibit P2 the Applicant was paid before she could sign the agreement as there is no evidence supporting the same.

Regarding the payment of consideration, the Applicant's counsel submitted that, at Page 16 DW3 was cross-examined and stated that there was no acknowledge of payment. That, under page 20 DW4 stated that it was not a dishonest when one stop transfers for want of payment. The counsel maintained that the Respondent was the employer of the Applicant but one cannot bring forward private agreement with employment relationship.

Arguing for the second ground the Applicant's counsel submitted that, the arbitrator based his decision on personal thoughts instead on the available evidence and the provision of the law. That, under page 6 the arbitrator stated that the Applicant was paid full consideration before he could sign the agreement but he did not state where he got that evidence to support that holding as neither the witness testified that the amount was to be paid before signing the agreement. He insisted that,

as per the binding nature of the contract it was the Respondent who was bound to pay the Applicant after signing the contract the act which the Applicant was fighting for hence the issue of fraud and misrepresentation was out of context, hence the holding by the arbitrator lacks supporting evidence and testimonies on record.

Regarding the third ground the counsel for the Applicant argued that, on reason for termination, there was no any dishonest committed by the Applicant in the cause of her employment. Regarding the procedure for termination submitted that Rule 13 of the Employment and labour Relations (code of Good Practise) Rule 2007 was not complied with. He submitted that, under exhibit D2 which is the disciplinary hearing minutes no claim or statement which was presented by the Respondent and no evidence was laid against the Applicant at the disciplinary hearing. That, what transpired was that, the Applicant was just questioned and the answer could only be **Yes** or **No** a fact which was contrary to Rule 13(5) which requires an employee who is found guilty to be given an opportunity to put forward any mitigation before the decision is made. That, as per exhibit D2 there is no where it indicated that the Applicant was found guilty of the allegations but the chairman at the end stated that the employer will communicate when

they shall give their decision which again was never communicated to the Applicant and instead a termination letter was the sanction imposed to the Applicant.

The counsel was of the view that, since no any mitigation was done it was wrong for the arbitrator to say that the mere fact that the Applicant appeared before the disciplinary hearing it was enough even if the other procedure was flouted. That, Rule 13 of the Rules should be applied in the checklist as the rule stipulated what is to be done by both the employer and employee including the right to mitigate and to be reminded on the right of appeal to superior position of the employer or to refer the matter to the CMA.

The counsel for the Applicant finalised by stating that, the application is of merit and the award issued by the arbitrator be revised and set aside and grant the Applicant reliefs as prayed for under the CMA F 1.

Responding to the Applicant's submission Mr. Kahunduka, the counsel for the Respondent argued jointly for the 1st and 2nd grounds and 3rd ground was argued separately. For the 1st and 3nd ground he submitted that, the Applicant was an employee of the Respondent as a Vice President and they entered an agreement for the purchase of the

motor vehicle at a price of Tshs 24,620,000/=. That, the agreement was in writing and the Respondent paid the contractual amount and the Applicant handled over the original document of the car for sale. He contended that, after the Applicant was paid, she wanted to claim another Tshs. 24,620,000/= from her employer on account that she was not paid the contractual amount.

The counsel for the Respondent further submitted that, when looking the transaction and the surrounding circumstance it cannot be said that the transaction was purely private and does not touch the trust of the Applicant to her employer. On the claim that the Respondent should show proof of payment, the counsel for the Respondent submitted that, exhibit P2 which is a sale agreement proves that fact together with the evidence by DW3 showing that the Applicant was paid in cash in USD equivalent to Tshs. 24,620,000/=. He maintained that, the act of the Applicant of demanding double payment is an act of dishonest and therefore incompatible with her employer.

The Respondent's counsel contended that, section 60 of TEA the admitted facts do not need proof and since the Applicant admitted various facts then no proof is needed thus the Applicant prays that the ground 1 and 2 be dismissed as they have no substance. He added that,

Rule 13(11) of GN No. 42/2007 provides for the exceptional circumstances where the employer may dispense with the guidelines on termination but the same was not done as the Applicant was given a right to be heard as per exhibit D2. That, at the end of the disciplinary hearing page 2 of the summary, the Applicant was given a chance to mitigate but said nothing.

It is the submission by the Respondent's counsel that, procedure for termination was not tainted with irregularities as for the Applicant to be dishonest does not only prejudice the organisation but also deters other people interested in investing in that organisation. The counsel for the Respondent finalised with a prayer for dismissal of revision application with costs for being meritless.

In a rejoinder submission the counsel for the Applicant reiterated that, the issue as to whether the Applicant was paid is not supported by the record of the CMA. That, in exhibit D2, the disciplinary hearing form does not indicate or prove payment and the amount paid. That, the Applicant well elaborated at page 21 to 25 of the proceedings that, she handled over the documents believing that the Respondent could be trusted as she was working for them.

On the issue that the Applicant raised double claim and wanted to gain more from the Respondent the counsel for the Applicant submitted that, there was uncollaborated evidence between DW4 and DW2 regarding the payment. On the claim that the Applicant admitted to a number of facts the counsel submitted that, those facts have not been told.

After a thorough reading of the records of the CMA, the present application, affidavit in support of the application and the submissions by the counsel for the parties, the issue that need court determination is whether the CMA was correct to conclude that the Applicant was lawful terminated from his employment by the Respondent and the procedures for termination were followed.

The burden of proof in labour matters lies upon the employer to prove that the employee was fairly terminated and the procedures for termination were followed. In determining the fairness of employment termination, it is important to consider the provision of section 37(2) (a) (b) and (c) of the Employment and Labour Relations Act, 2004 which requires employer to prove that the reason for termination is valid and fair and the termination is in accordance with fair procedures.

Starting with the validity and fairness of the reasons, the allegation against the Applicant that led to the termination of his employment contract is misconduct associated with dishonesty as per exhibit P5. Rule 12(3)(a) of Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007 states the misconducts which may justify termination and it includes amongst other an act of gross dishonesty. Under that provision the employer may terminate the employment contract when the employee does acts of gross dishonesty. Although the law provides that an act of gross dishonest is amongst the reasons for the termination of employment contract the same is not automatic as its subject to proof that the act done by the employee really amounted to a gross dishonest.

Reading the evidence on record and according to the evidence by DW1 Alan J, DW2 Varlyn Horris as well exhibits D1, and D2 the Applicant was summoned to a disciplinary hearing for an allegation associated with a dishonest by a fact that she wrote a letter to TRA stopping the transfer of the registration of the motor vehicle from her to the Respondent. There is no dispute that on 24/4/2019 the parties to this application executed the sale agreement, exhibit P2 showing that the Applicant sold her motor vehicle to the Respondent. It is also not

disputed that, the Applicant wrote to TRA to stop the transfer of the vehicle to the Respondent on account that the consideration amount was not paid by the Respondent. What is disputed is whether the conduct of the Applicant amounted to dishonest to her employer warranting the termination of her employment. It is the claim from the Respondent that, the motor vehicle sale agreement shows that, the Applicant was paid the consideration amount but yet stopped and prevented the transfer of the motor vehicle to the Respondent.

It is my view that, in order to conclude that the act by the Applicant amounted to dishonest as a reason for termination of employment contract, one has to ask himself as to whether the contract was executed by the parties in their employment relationships capacity. Reading the whole contents of exhibit P2 it is evident that, the contract was purely personal meaning that it was independent from employment relationship as between the parties. The Applicant entered into a contract with the Respondent in her personal capacity and not an employee of the Respondent. Likewise, the Respondent entered into that agreement not in a capacity as the Applicant's employer. To me, the sale agreement of the motor vehicle was personal arrangement between the parties and it has nothing to do with their employment

relationship. That being the case, it is my settled view that, if the Applicant was claiming non-payment of the contractual money and used that as a reason to stop the transfer, that cannot be construed as dishonest to her employer because that has nothing to do with her employment terms.

As the sale agreement of the motor vehicle was personal arrangement anyone challenging non-compliance or breach of the terms of agreement could have pursued the same in civil matter. In my view, the Respondent could have properly terminated the Applicant if there was a suit instituted for breach of sale agreement and it was proved that the Applicant acted dishonestly. The issue of compliance or non-compliance of the terms of agreement did not relate to the employment terms of the parties as it was entered in their personal capacity hence out of the scope of jurisdiction of the CMA.

It is for the reasons stated above I find that, there was no valid reason for the Respondent to terminate the Applicant's employment contract. No proof that the Applicant acted dishonestly against the employer for her to suffer termination.

Regarding the fairness of the procedures for termination, the law makes it mandatory for the employee to be given opportunity to put

forward any mitigation factor after being found guilty of the allegation and before any decision is made. Reference is made Rule 13 (7) of the Employment and Labour Relations (Code of Good Practice) Rule GN No. 42 of 2007. Looking on the disciplinary hearing form exhibit D2, the committee after it found the Applicant guilty of dishonest, it allowed the Applicant to address it but, she opted to remain silent.

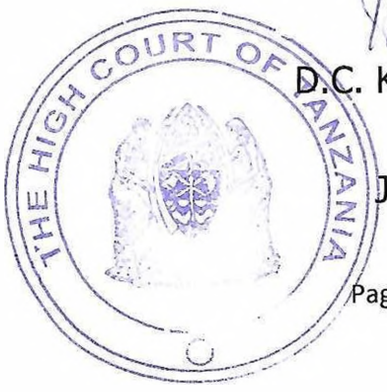
The records also show that, the reasons for termination were communicated to the Applicant and the right to appeal to a higher authority was also explained in the termination letter which is exhibit P5. It is however in record that, the witness Julius Karata who alleged that there was payment to the Applicant was not called before the disciplinary committee to verify such allegation. He only testified before the CMA, and this is contrary to Rule 13 (5) of GN No. 42 of 2007 which requires all evidence in support of the allegation against the employee to be presented at the hearing to allow the employee to question the witness on that evidence. I therefore find that, the procedures for termination were also not followed.

For the reasons stated above I find that, there was no any valid reason for the termination of the Applicant's employment and all procedures for termination was not complied with thus amounting to

unfair termination of the Applicant. Having found that the Applicant was unfairly terminated it follows therefore that, she is entitled to compensation. I therefore award compensation of 12 months' salary. The Applicant claimed that she was paid 1,800,000 as monthly salary but the employment agreement tendered, exhibit P1 indicate the salary of Tshs. 1,500,000. Thus, the compensation computation will base on that amount as no evidence was brought proving the change in that salary. The Applicant is therefore entitled to 12 months salary at the rate of Tshs 1,500,000 per month equivalent to Tshs. 18,000,000. The Applicant is also entitled to leave pay at the tune of Tshs. 1,500,000 and payment in leu of notice Tshs. 1,500,000 and certificate of service.

In the upshot, the revision application is of merit therefore, allowed. The Respondent is ordered to pay to the Applicant the total amount of Tshs. 21,000,000 and issue certificate of service to the Applicant. In considering that this is a labour dispute, no order for costs is granted.

DATED at **ARUSHA** this 21st day of July, 2022.



D.C. KAMUZORA

JUDGE