IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA LABOUR DIVISION

AT BUKOBA

LABOUR REVISION NO. 22 OF 2020

BETWEEN

FLAVIAN RUGEMALILA.....1st APPLICANT

ANNA MAREGESI.....2nd APPLICANT

GLORIA KASININI.....3rd APPLICANT

THECLA MUGAYIZI.....4th APPLICANT

REGINALD MUSHI.....5th APPLICANT

CHRISTINA MAFIE.....6th APPLICANT

AND

MSPH TANZANIA LLC..... ,..... RESPONDENT

JUDGMENT

Date of Last Order: 29/06/2022

Date of Judgment: 08/07/2022

A.E. MWIPOPO, J,

This application for revision is against the decision of the Commission for Mediation and Arbitration (CMA) at Bukoba in CMA/BMC/18/2020. The applicants namely Flavian Rugemalila, Anna Maregesi, Gloria Kasinini, Thecla Muganyizi, Reginald Mushi and Christina Mafie are praying for the order of the Court in the following terms:-

1. *That, this Court be pleased to call for all the records, proceedings and award on Labour Dispute No. CMA/BMC/18/2020 of the CMA at Bukoba, examine it and if the Court is pleased, revise by setting it aside due to its illegalities.*
2. *That, this Court be pleased to declare that the CMA at Bukoba erred in law in Labour No. CMA/BMC/18/2020 by failing to make proper analysis of evidence during trial.*
3. *That, this Court be pleased to declare that the CMA at Bukoba erred in law and facts in Labour Disputes No. CMA/BMC/18/2020, for failing to declare that the applicants were unfairly terminated from the employment despite the evidence which were tendered.*
4. *That, this Court be pleased to declare that the CMA erred in law and facts for failing to hold that the applicants were entitled to compensation after being unfairly terminated from employment.*
5. *That, this Court be pleased to grant any lawful order that may deem fit, just and suitable to grant.*

In order to get a picture of the matter before this Court, brief history of the dispute will suffice. The applicants were employed in various post by the respondent namely MSPH in a fixed term contract. The respondent got information that the applicants signed in attendance of the gym showing that they get service at the gym in Bukoba Municipal on various dates between October and November, 2020, the time which they were supposed to be outside Bukoba Municipal on official duties. The employer decided to conduct disciplinary proceedings against the applicants and other employees. The employer served the applicants and other

responsible employees with a letter to show cause why they should not be charge for disciplinary offence before they were charged for disciplinary offence of dishonesty. The disciplinary hearing was held and applicants admitted to commit the offence. The disciplinary committee found all of them guilty of the disciplinary offence and recommended to the employer that all of them to be given written warning. The employer did not agree with the recommendation of the disciplinary committee and decided to terminate their employment on 23.04.2020. The applicants and other terminated employees were aggrieved by the decision of the employer and instituted labour dispute No. CMA/BMC/18/2020 in Commission for Mediation and Arbitration at Bukoba. The Commission delivered its award in favour of the respondent. The applicants were aggrieved and they filed the present revision.

On the hearing date, both parties were represented. The applicants were represented by Mr. Geraz Ruben, advocate, whereas the respondent was represented by Ms. Ernestila Bahati, advocate.

Mr. Geraz Ruben submitted that the applicants were employed by the respondent from 2018 to 23/04/2020 when they were terminated for misconduct. The disciplinary committee which conducted disciplinary hearing on 18/03/2020 recommended to the employer for the applicants to be given severe written warning for the misconduct. However, on 23/04/2020 the applicants were served

with termination letter. The counsel said that the CMA did not consider what was submitted as evidence by the applicants. The applicants were not given right to representation during disciplinary hearing. The decision of the disciplinary hearing was for the applicant to be given severe warning letter. However, the employer terminated their employment contrary to the recommendation of the disciplinary committee. The act of the applicants to attend or not to attend at gym did not cause any loss to the employer. The commission did not analyze the evidence adduced by the applicant as result it ending up delivering wrong award.

The counsel went on to say that the disciplinary committee was chaired by Stella Nghambi who is Senior Human Resources Manager. The 2nd, 3rd, 4th and 5th applicants were from the same department. It was wrong for their immediate boss to be the chairman as she was not impartial. This is Contrary to Disciplinary hearing guidelines which is part of the scheduled to the Employment and Labour Relations Act. For that reason, the procedures from termination was not followed.

In response, Ms. Ernestina Bahati said that the respondent followed all disciplinary procedures before terminating applicants' employment. Among the procedures followed includes to serve the applicants with notice to show cause which was given to them on 09/03/2020, invitation to attend disciplinary hearing on 18/03/2020 – Exhibit C5, the disciplinary hearing was conducted on 23/03/2020 and the applicants admitted to the disciplinary committee to commit disciplinary

offence and they apologized. Disciplinary hearing form – Exhibit C6 proves this. The applicants were charged each for the offence of gross dishonestly which is contrary to paragraph 12.9 of the employers regulation – Exhibit C7. The employers Regulation provides that gross dishonesty is gross misconduct. The applicants lied that they went to gym while they were supposed to travel officially. The applicants gained economically by being paid for travelling while they did not travel hence occasioning loss to the respondent. The respondent is a donor founded organization which need to utilize its funds according to the law. The right of representation was stated in Exhibit C5 which is an invitation to attend disciplinary hearing. The applicants did not bring representatives during disciplinary hearing and this is their own choice.

The counsel for respondent admitted that disciplinary committee recommended the applicants to be given written warning, but the management decided to terminate their employment. The management is not bound by disciplinary committee recommendation. The employer made the right decision according to the evidence available. The applicants were charged for gross misconduct which among its penalty is termination from employment. She cited the case of **Paschal Bandiho vs. Arusha Urban Water Supply and Sewerage Authority (AUWSA),** Civil Appeal No. 4 of 2020, Court of Appeal at Arusha, (unreported), where it was held at page 24 that dishonesty is a misconduct which

is a serious disciplinary offence which attracts termination. There was no warning letter which was issued to the applicants after disciplinary committee concluded its hearing.

On the composition of the Disciplinary Committee during hearing, the counsel said that wording of guidelines cited states that the employer has to follow what is provided in the guidelines as much as possible but there are no strict obligation to adhere to the guideline according to regulation 13 (11) of the G.N. 42 of 2007. The employer is not obliged to adhere to all guidelines during disciplinary hearing in a checklist fashion, but what is important is to make sure that principles of fair hearing are followed. As the applicants were informed of the charges against them, were given sufficient notice to appear before disciplinary hearing with representative of their choice and they were give chance to be heard, the disciplinary hearing was fair. The allegation that the chairman of disciplinary hearing came from the same department is substantiated. The applicants employment contracts – Exhibit C1 does not show at all that the applicants were in the same department as the Chairman of the Disciplinary Committee who is from Human Resources and Administration Department. The applicants were field assistants, drivers and data clerks who were in different departments from that of the chairperson.

In rejoinder, the counsel for applicants said that disciplinary Hearing Form – Exhibit C6 show that the disciplinary committee recommendation was for the applicants to be given warning letters but the employer decided to terminate them. The disciplinary committee is appointed by the employer hence part of the employer, but the same employer decided to terminate them against the recommendation.

From the rivalry submissions, it is clear that the applicants are not challenging the reason for their termination of employment. The evidence available in record shows that the applicants were charged for the disciplinary offence of gross dishonesty which is among the acts which may justify termination under rule 12(3) (a) of the Employment and Labour Relations (Code of Good Practices) Rules, G.N. 42 of 2007. In the cited case of **Paschal Bandiho vs. Arusha Urban Water Supply and Sewerage Authority (AUWSA),** (supra), the Court of Appeal held that gross dishonest is among serious misconduct which attracts termination. The applicants admitted to commit the offence during disciplinary hearing, as result, the employer may terminate the employment of the employee who was found guilty of the offence. Thus, there was fair reason for termination of applicants' employment.

The submission by the counsel for the applicants mainly based on the unfairness of the procedures for termination. The counsel submitted that

applicants were not given right to representation during disciplinary hearing, the disciplinary committee was chaired by Stella Nghambi who is a Senior Human Resources Manager hence not impartial as some of the applicants where from the same department, and the decision to terminate them made by employer was against the recommendation of the disciplinary committee that applicants has to be given severe warning letter.

The Employment and Labour Relations Act, 2004, provides in section 37 (2) (c) that the termination is unfair if the employer fail to prove that that the employment was terminated in accordance with a fair procedure. The procedure of termination for misconduct is provided under rule 13 of the G.N. No. 42 of 2007. The said rule provides as follows, I quote:

> *"13.-(1) The employer shall conduct an investigation to ascertain whether there are grounds for a hearing to be held.*
>
> *(2) Where a hearing is to be held, the employer shall notify the employee of the allegations using a form and language that the employee can reasonably understand.*
>
> *(3) The employee shall be entitled to a reasonable time to prepare for the hearing and to be assisted in the hearing by trade union representative or fellow employee. What constitutes reasonable time shall depend on the circumstances and the complexity of the case, but it shall not normally be less than 48 hours.*

(4) The hearing shall be held and finalized within reasonable time and chaired by a sufficiently senior management representative who shall not have been involved in the circumstances giving rise to the case.

(5) Evidence in support of the allegation against the employee shall be presented at hearing. The employee shall be given a proper opportunity at hearing to respondent to allegations, questions any witness called by the employer and to call witness if necessary.

(6) Where employee unreasonably refuses to attend the hearing, the employer may proceed with the hearing in the absence of the employee.

(7) Where hearing results in the employee being found guilty of the allegations under consideration, the employee shall be given the opportunity to put forward any mitigation factors before a decision is made on the sanction to be imposed.

(8) After the hearing, the employer shall communicate the decision taken, and preferably furnish the employee with written notification of the decision, together with brief reasons.

(9) A trade union official shall be entitled to represent a trade union representative or an employee who is an office-bearer or official of a registered trade union, at a hearing.

(10) Where employment is terminated the employee shall be given the reasons for termination and reminded of any rights to refer a dispute concerning the fairness of the termination under a collective agreement or to the Commission for Mediation and Arbitration under the Act.

(11) In exceptional circumstances, if the employer cannot reasonably be expected to comply with these guidelines, the employer may dispense with them. An employer would not have to convene a hearing if action is taken with the consent of the employee concerned.

(12) Employer shall keep records for each employee specifying the nature of any disciplinary transgressions. The action taken by the employer and the reasons for actions.

(13) In case of collective misconduct, it is not unfair to hold a collective hearing."

The evidence available in record shows that the inquiry was conducted where the applicants were asked to show cause as to why disciplinary procedures should not be commenced against them through a letter from respondent – Exhibit C4 and they replied. Then, they were served with invitation to attend disciplinary hearing – Exhibit C5. The said Exhibit C5 notified them the time, date and venue for their disciplinary hearing. Exhibit C5 also contained the disciplinary charge against each applicant and provided them with right to representation, right to call witnesses and to present evidence in their defense. The applicants attended the hearing where they admitted to commit the offence. The complainant presented his case and the applicants were found guilty of the offence. The disciplinary committee afforded all applicants opportunity to mitigate after they were found guilty before it made its recommendation to the employer that all applicants has to be given written warning for the offence. All applicants were informed of the

recommendation of the disciplinary committee to the employer. The employer decided to terminate their employment despite the recommendation by the disciplinary committee. This evidence proves that the employer followed procedures for termination for misconduct provided by the law.

On the point that the chairperson of the disciplinary committee was not impartial as he was from the same department with some of the applicants, rule 13 (4) of the G.N. No. 42 of 2007 and guideline No. 4 (2) of the Guidelines for Disciplinary, Incapacity and Incompatibility Policy and Procedures which is Schedule to G.N. No. 42 of 2007, provides that the Chairperson should be impartial and should have not been involved in the issue giving rise to the hearing and if possible should come from different department.

In the present case, the chairperson namely Stella Nghambi was Senior Human Resources and Administration Manager. The applicants' alleges that the chairperson of disciplinary committee being Human resources Manager she was coming from the same department with the 2nd, 3rd, 4th and 5th applicants hence she was not impartial. However, there is no evidence at all from the record which show that the 2nd, 3rd, 4th and 5th applicants were from the same department with the chairperson of the disciplinary committee. Even if the said chairperson was from the same department with the applicants, the guidelines provides clearly that if it is possible the chairperson should come from different department. The words

of the said guideline is not mandatory and the employer is required to appoint Chairman from different department if it is possible. What is needed is for the chairperson to be impartial. Moreover, there is no evidence to prove that the said chairperson was involved in the issue giving rise to the disciplinary hearing or was impartial. Thus, the issue has no merits.

Regarding the applicants' allegation that some of the applicants were not informed of their rights to representation, the evidence available from invitation to attend disciplinary hearing – Exhibit C5 shows that all applicants were informed of their rights to representative of their choice. Also, the disciplinary hearing form – Exhibit C6 shows that 1st, 2nd, 3rd, 5th and 6th applicants were asked by disciplinary committee during disciplinary hearing if they want to have representative and their answer was that they don't want to have one. Thus, it was their choice not to have representative during disciplinary hearing. For the 4th applicant, disciplinary hearing form – Exhibit C6 is silent on the issue whether she was asked by the disciplinary committee if she want to have representative of her choice. Despite the omission, the invitation to disciplinary hearing shows that the said right was given to the 4th applicant. Thus, the 4th applicant was not prejudiced in any way.

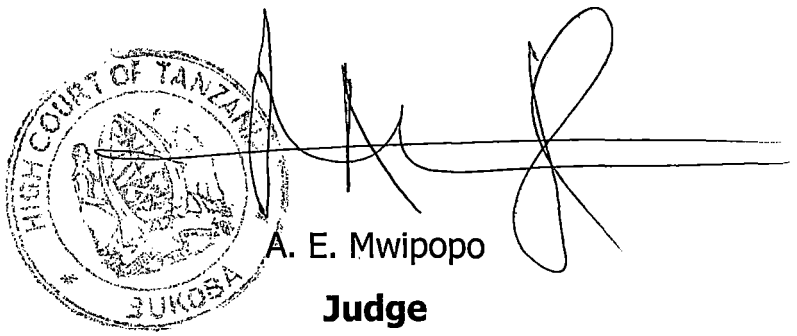
Turning to the applicants' assertion that it was wrong for the employer to terminate their employment while the disciplinary committee has recommended for applicants to be given written warning, the G.N. No. 42 of 2007 provides in

rule 13 (8) that after disciplinary hearing, it is the employer who shall communicate the decision taken and preferably furnish the employee with written notification of the decision on the sanction imposed. The interpretation of the said rule is that it is the employer who decide the disciplinary penalty to the employee who was found guilty of the disciplinary offense. The duty of disciplinary committee is to find out and make decision if the employee is guilty of misconduct after considering the evidence presented by employee and employer's representative. When the employee is found guilty of the disciplinary offence, the Chairperson of the disciplinary committee afford the employee with opportunity to mitigate before recommending the penalty to the employer. The employer is not bound to follow the recommendation of the disciplinary committee in decision to imposing a sanction to an employee who has been found guilty of the disciplinary offence.

In the case at hand, the disciplinary committee recommended applicants to be given warning after finding them guilty of the disciplinary offence but the employer decided to terminate their employment. The reason for employer's decision to terminate them according to termination letter – Exhibit C8 is that the disciplinary offence they were charged with was severe which is against the law and employer's employment policy. Thus, the decision of the employer was fair and the reason for termination of applicants' employment was provided according to the law. The employer (respondent) was not obliged to follow the

recommendation of the disciplinary committee after the applicants were found guilty for the disciplinary offence. Thus, the trial Commission rightly held in the arbitral award that the procedure for termination was fair.

Therefore, I find the revision is devoid of merits and I hereby dismiss it. The award of the trial Commission for Mediation and Arbitration is hereby upheld. As this is a labour matter, each party to the suit shall take care of its own cost.



A. E. Mwipopo

Judge

08/07/2022