IN THE HIGH COURT OF THE UNITED REPUBIC OF TANZANIA

LABOUR DIVISION AT ARUSHA

LABOUR REVISION NO.130 OF 2021

(C/f Labour Dispute No. CMA/ARS/ARS/ 532/20/226/202 at the Commission for Mediation and Arbitration at Arusha)

MOBISOL UK LIMITED.....APPLICANT

Vs

RAPHAEL MUSSA DAUDI.....RESPONDENT

JUDGMENT

Date of last Order:28-7-2022

Date of Judgment:9-8-2022

B.K.PHILLIP,J

Aggrieved by the award made by the Commission for Mediation and Arbitration at Arusha ("CMA") in Labour Dispute No. CMA/ARS/ARS/532/20/226/202, the applicant herein lodged this application under the provisions of Rules 24(1), (2) (a) (b) (c) (d) (e) (f), (3) (a) (b) (c) (d) , 28 (1) (b) (c) (d) and (e) of the Labour Court Rules, G.N. No. 106 of 2007 and sections 91 (1) (a), (2) (b) (c) and 94 (1) (b) (i) of the Employment and Labour Relations Act, 2004, (the " ELRA"), praying for the following Orders;

i) That this Honourable Court be pleased to revise and set aside the award of the Commission for Mediation and Arbitration of Arusha at Arusha dated 12th November 2021, delivered by Hon. Octavian Mwebuga, Arbitrator in Labour Disputed No.CMA/ARS/ARS/532/20/226/20.

ii) Any other Order this Honourable Court may deem fit and just to grant.

The application is supported by an affidavit sworn by Mr. Emmanuel Meisilal, the applicant's principal officer. The respondent filed a counter affidavit in opposition to the application.

A brief background to this application is that the respondent was employed by the applicant as a Chief Sales Officer under a two (2) years contract of employment commencing from 16th December ,2019 to 15th December 2021, at a monthly salary of Tshs 15,000,000/=. However, the same was terminated by the applicant on 1st October 2020, following the decision of a disciplinary committee , in which the respondent was found guilty of the offence of gross dishonesty and major breach of trust for non disclosure of conflict of interests in a transaction which involved hiring of motor vehicle with registration No.T551 AYK, Nissan Patrol by the applicant (Hereinafter it shall be referred to as "the motor vehicle").The applicant alleged that the said motor vehicle belonged to the respondent and he is the one who engineered the move to hire that motor vehicle.He rejected all other motor vehicles which were proposed to be supplied to the applicant by the applicant's contracted supplier, JMaffie Limited. He influenced the supplier to hire his motor vehicle aforesaid (Nissan Patrol –T551 AYK) so as to benefit from the rental fees. Not only that, the applicant alleged that the respondent hiked the prices for that motor vehicle because he had personal interest on the deal. Upon being dismissed from employment respondent lodged complaints at the CMA for breach of contract of employment. He was the sole witness for his case.

The applicant paraded four witnesses, namely Emmanuel Meisilal (DW1), head of service assurance, James Aseri Martin (DW2), a businessman and owner of a car rental Company known as "JMafie", Amanda Benson Chonjo (DW3) ,applicant's fleet Coordinator, Erick Stanslaus (DW4), a lawyer who chaired the disciplinary hearing.

Upon hearing the respondent's complainant the Arbitrator rule that the respondent was unfairly terminated and there was breach of the respondent's contract of the employment. He awarded the respondent a sum of Tshs 225,000,000/= being damages and salaries for the remaining period of his contract. The applicant was dissatisfied with the award made by the Arbitrator, thus he filed the instant application.

In this application the learned Advocates Mnyiwala Mapembe and Johnson Kachenje appeared for the applicant and the respondent respectively. The application was argued by way of written submissions.

The grounds for revision as stated in the affidavit in support of the application are as follows;

i) That the Arbitrator erred in law and facts in holding that the reasons for termination of the respondent employment contract were invalid.

ii) That the Arbitrator erred in Law and facts in holding that there was no evidence that the respondent owned the motor vehicle with registration No. T551 AYK and was receiving money from DW2 before and after the alleged sale of the same to Dollar

Kusenge on 13.1.2019 and that the respondent had no obligation to declare conflict of interest.

iii) That the Arbitrator erred in law and facts in disregarding the weight of Vodacom Mpesa transactions (Exhibit –D7) for reasons that were considered and overruled by the Commission thus makes the Commission *functus officio.*

iv) The Arbitrator erred in law and facts in holding that the respondent was denied the right to be heard.

v) The Arbitrator erred in law and facts in holding that investigation reports (Exhibit D5 and D6 collectively) were conducted and issued illegally.

Mr. Mapembe argued grounds No. 1 and 2 conjointly. He submitted that according to exhibits P5 (the charge sheet) and P7 (Disciplinary hearing form) the respondent was terminated due to gross dishonesty and major breach of trust occasioned by failure to declare conflict of interests in the transaction that involved hiring the motor vehicle for the applicant. According to exhibit P3 collectively (Employee handbook), the respondent was required to avoid conflict of interests and was not supposed to benefit in any way from the contract for supply of the motor vehicle that was awarded to JMaffie Limited by the applicant. It was Mr. Mapembe's argument that the documentary evidence tendered at the CMA and the testimony of DW2 which was to effect that the respondent gave him the motor vehicle in January 2019 corroborated with the respondent's email (exhibit D3 collectively) sent to Mr. Meisilal (DW1) and copied to Mrs Benson (DW2) dated 29.1.2020, proves that the respondent is the one who

engineered the hiring of the motor vehicle. He went on arguing that Exhibit D7 (Mpesa transactions) reveal that on 13.7.2020 and 12.8.2020 the respondent's cellphone No.07522032167 received Tshs 2,7000,000/= from Mr. Martin (DW2). That is a proof that the respondent's assertion that he sold the motor vehicle to Dollar Kusenge on 13.1.2019 is not true and Exhibit P9 is a forged document prepared to deceive the applicant that the motor vehicle belongs to Dollar Kusenge, contended, Mr Mapembe.

Moreover , Mr. Mapembe, contended that Exhibit D2 (the Memo) proves that the respondent is the one who asked for the increment of the motor vehicle rental fees from Tshs 93,000/= to Tshs 105,000/=per day and Tshs 360,000/= per month.

It was Mr. Mapembe's contention that the level of dishonesty of the applicant made the employment relationship between the applicant and the respondent intolerable and justified the termination of the respondent's employment contract. He cited the case of **Autozone Vs Dispute Resolution Center of Motor Industry and 2 other , case No. JA52/2015 in Labour Appeal Court of South Africa, Johanesburg** and **Mic Tanzania Plc Vs Sinai Mwakisisile , Revision, No.387/2019,** (both unreported) to cement his argument.

With regard to the 3rd ground , Mr. Mapembe argued that Exhibit D7 collectively (documents for Mpesa transaction from Vodacom) were duly admitted after the objection raised by the respondent's advocate was overruled.Thus , after admitting the same in evidence the Arbitrator was

functus officio. He was barred by law to challenge the admission of those documents on the reason that they were admitted belatedly as he did his decision. Mr. Mapembe cited the case of **Zee Hotel Management Group & others Vs Minister of Finance & others, (1997) TLR 266,** to bolster his argument.

Moreover, Mr. Mapembe argued that exhibit D7 collectively were properly admitted because they were obtained on 24.5.2021 whereas hearing of the respondent's complaint commenced on 30.3.2021, so it was not possible to file those documents at CMA earlier before commencement of the hearing. The Arbitrator's criticism on Exhibit D7 collectively that they do not have the name of the author is unfounded and misconceived because the documents clearly show that they are from Vodacom Tanzania PLC and are duly stamped, and a certificate of authenticity of the same was filed at the CMA, contended, Mr. Mapembe. He insisted that the Arbitrator erred in disregarding exhibit P7 collectively.

Submitting for the 4th ground Mr. Mapembe argued that the Arbitrator erred in law and fact to hold that the respondent was denied his right to be heard. He argued that the respondent was served with a charge sheet, he filed his defence (Exhibit P6), disciplinary hearing was conducted as evidenced by hearing Form (exhibit P7), the respondent cross examined all of the applicant's witnesses and to authenticate the proceedings he signed each page of the proceedings. At the disciplinary hearing he brought his witnesses.

With regard to the 5th ground , Mr. Mapembe, argued that the Arbitrators findings that the investigation was wrongly conducted and that the investigation report was illegal on the ground that DW1 who conducted the investigation was the one who ordered for the same is not correct. He contended that Rule 13 of G.N. No. 42 /2007 does not prohibit the officer who makes directives that investigation should be conducted to be involved in the investigation. No evidence was adduced to prove that DW1 was biased against the respondent during the investigation. Thus there is no justification to hold that investigation was illegal, contended Mr. Mapembe. Expounded on the propriety of the investigation report, he submitted that the respondent was served with the investigation report on 15.9.2020 and signed the same.He went on submitting that the according to the decision of this Court in the case of **Geita Gold Mining Ltd Vs Tenga B. Tenga , Labour Revision No.14 of 2021,** (unreported) there is no need to serve the employee with the investigation report because the same is for the use of the employer to determine whether there are offences committed by the employee or not. Not every non-compliance of procedural law renders the case to collapse , only non-compliance of procedural law which prejudice the complaining party can be termed as fatal, argued Mr. Mapembe.

In addition, Mr. Mapembe, submitted that at page 3 of the proceedings shows that DW1 (respondent) testified without being sworn contrary to rule 25 (1) of G.N. No.67 of 2007. Relying on the case of **Attu J. Myna Vs CFAO Motors Tanzania Limited , Civil Appeal No.269 /2021,** he argued that where the High Court notes a witness testified without being

sworn or affirmed as required by the law it has to order re-hearing of that particular witness and the Arbitrator has to compose a fresh decision .

In rebuttal, Mr. Kachenje, submitted as follows; That the reason for termination of the respondent's employment was not valid because by the time the respondent was charge and arraigned before the disciplinary committee, the motor vehicle in question was already sold to Dollar Rajabu Kusenge. It was no longer belonging to the respondent. The motor vehicle was sold on 13th January 2019 (Exhibit P9). Effecting the transfer of ownership to Dollar Rajabu Kusenge was not under the control of the respondent. The issue regarding the payment of stamp duty that was raised by the applicant before the CMA was not relevant because the CMA does not deal with issues concerning payment of taxes/ government duties. He went on submitting that under the circumstances the respondent was not obliged to declare any conflict of interests as per the requirements stipulated in the Employees Handbook (Exhibit P3 collectively) because he was not the owner of the motor vehicle. The allegations that the respondent is the one who gave DW2 the motor vehicle in January 2019 were not substantiated, hence they are all lies.The internal Memo (exhibit D2) which is alleged that it was used to request for increment of rental fees was never made by the respondent because the same indicates that it came from the Chief Financial Officer.The respondent was the Chief Sales Officer not Chief Financial Officer. His name was just inserted in the Internal Memo and he never owned as it does not bear his signature. Mr. kachenje contended that all case laws cited by Mr. Mapembe are not relevant in this case.

Responding to the arguments raised by Mr. Mapembe in respect of the 3rd ground Mr. Kachenje argued as follows;That the Arbitrator was not *functus officio.* He was not barred by law to comment on the admission of exhibit D7 collectively in his award and to disregard them simply because he had admitted the same. Mr. kachenje contended that the Arbitrator committed error in admitting exhibit D7 collectively and he rectified his error when he was composing the award as he directed his mind properly and disregarded exhibit D7 collectively since the same were filed at the CMA belatedly. In addition, he was of the view that the Arbitrator did not err to disregard Exhibit D7 collectively since there was no

DUWASA) Civil Appeal No.343 /2019 (unreported) , to bolster his arguments.

As regards the 5th ground , Mr. Kachenje's response was as follows; That the investigation was conducted by the person who ordered it against the principle of natural justice which says that no one should be a judge of his own case. The investigation did not disclose the person who informed the applicant what was alleged in that report. The respondent was not interrogated. That means he was not involved in the investigation while he was the one investigated and accused of dishonesty. The investigation report was not served to the respondent. Therefore ,he went to the disciplinary hearing unprepared contrary to the labour laws. Mr. kachenje cited the case of **Yusufu Kisare Vs Higher Education Loan Board , consolidated Labour Revision No. 755& 858 of 2018** (unreported), to cement his arguments. He refuted Mr. Mapembe's contention that it is not a must for investigation report has to be served to the employee.

In conclusion of his submission, Mr. Kachenje insisted that the reason for termination of the respondent's employment was not valid and the procedure for his termination was flouted. He implored this Court to dismiss this application for lack of merit.

In rejoinder, Mr. Mapembe reiterated his submission in chief and went on submitting as follows; That sale agreement (exhibit P9) was not supposed to be admitted in evidence since no stamp duty was paid for the same. He cited the case of **First National Bank (T) Limited Vs Yohane Ibrahim Kaduma and another , Commercial case no.128 of 2019**, (

unreported) and **Zakaria Barie Bura Vs Theresia Maria John Mubira(1995) TLR 211,** and the provisions of section 5 (1) (a) and (b) of the stamp Duty Act, (Cap 189 R.E 2019) to cement his arguments. He pointed out that at the hearing he objected to the admission of the said sale agreement because it was unstamped but the Arbitrator overruled the objection and proceeded to admit the sale agreement in contravention of section 5 (1) (a) and (b) of the Stamp Duty Act, (Cap 189 R.E 2019) on the reason that he was not bound by technicalities and that issues pertaining to the payment of stamp duty are under the mandate of the TRA not CMA.

Furthermore, Mr. Mapembe insisted that DW2 testified that he had oral agreement with respondent that he would be paying him the rental fees for the motor vehicle and he paid him through Mpesa (Exhibit D7 collectively).There is ample evidence to prove that it was the respondent who brought the motor vehicle to Arusha , inspected it and informed DW2 about its availability. The respondent is the one who orchestrated the increment of the rental fees for that motor vehicle.

With regard to Exhibit D7collectively, Mr. Mapembe maintained that the Arbitrator was *functus officio* to use the same reasons which he overruled during the admission of exhibit D7 collectively to disregard the same. Moreover , he contended that the case of **JV Tangerm Construction Co Ltd** (supra) is distinguishable from this case because the findings in that case were in respect of the application of Orders VII Rule 14 and XIII Rule 1 of the Civil Procedure Code (CPC) whereas the applicable law in the instant case is Rule 24 (6) of G.N. No. 67 of 2007 which does not require

one to file leave before filling additional documents.Mr. Mapembe also distinguished the case of **Severo Mutengeki and another** (supra) on the ground that an audit report that was discussed in the that case is different from the investigation report the subject of this application.

I have taken into consideration the submissions made by the learned advocates and the same are highly appreciated. Starting with the rival arguments made in respect of the 1st and 2nd grounds for revision, there is no dispute that the original owner of the motor vehicle is the respondent. The respondent relied on the sale agreement dated 13.01.2019 (Exhibit P9), to prove that he sold that motor vehicle and the same no longer belongs to him. Let me say outright here that the sale agreement (exhibit P9) was wrongly admitted in evidence because it is among the instrument chargeable with stamp duty and was not stamped. (See section 47 of the Stamp Duty Act and the schedule thereto). The Arbitrator erred to overrule the objection raised by Mr. Mapembe on the admission the said sale agreement .As correctly submitted by Mr. Mapembe, the position of the law is that a document that is chargeable with duty is not admissible unless it is duly stamped. That is, stamp duty has been duly paid. The only option the Arbitrator had was to adjourn the hearing and give the respondent opportunity to pay the stamp duty. [See the case of **First National Bank (T) Ltd,** (supra) **and Zakaria Barie Bura**(supra)].Under the circumstances I hereby expunge from the CMA records the sale agreement dated 13.1.2019.Having expunged the sale agreement from the CMA's record ,there is no any document to prove that the motor vehicle was sold and transferred to Dollar Kisenge. Thus,

Mr. kachenje's argument that the respondent was not required to declare the conflict of interest as required in the Employees' Handbook (Exhibit P3) is unfounded because it is not supported by the evidence on record. Therefore, there is no way the respondent can avoid being held liable for failure to declare conflict of interests, this is regardless whether he is the one who brought the motor vehicle to Arusha as alleged by the applicant or not, or he received the rental fees for the motor vehicle.

In addition, Exhibit D5 (The motor vehicle registration Card) shows that the change of ownership of the motor vehicle from the respondent to Dollar Rajabu Kusenge was effected on 10th August 2020 whereas according to exhibits (D2 and D3 collectively) the process and the communication in respect of hiring the motor vehicle started in sometimes in January 2020, that is before the transfer of ownership of the motor vehicle to Dollar Kusenge. Thus, it was imperative to the respondent to declare his interests in respect of the motor vehicle.

Coming to the 3rd ground , I find the testimony of DW2 (Mr. Martin) to be credible as he is a witness with no interests to save. I wish to point out here that the Arbitrator erred to disregard exhibit D7 collectively (Mpesa transaction) on the reason that they were belatedly filed in Court after he had overruled the objection raised by the respondent's advocate that the same were belatedly filed in Court. I am in agreement with Mr. Mapembe that the Arbitrator was *functus officio* as far as the issue of filing the said Mpesa transactions (exhibit D7 collectively) before the CMA was concern. I have perused exhibit D7 collectively and in my considered opinion there was no any valid justification for disregarding them since they are

indicated clearly that they are from Vodacom and are duly stamped, and there is a certificate of authenticity for the same sworn by James Aseri Martin (DW2). In short, Exhibit D7 collectively proves that there was money sent to the respondent by DW2.

With regard to the 4th ground, the evidence adduced shows that the respondent was heard as i will explain soon.The evidence adduced shows that the respondent was served with the charge sheet (Exhibit P5) and investigation report (exhibit D5) ,he filed his defence , (Exhibit 6), he appeared before the disciplinary committee and pleaded not guilty to the charge leveled against him (see page 3 of hearing Form –exhibit P7). He called his witnesses and he cross examined all of the witnesses called by the applicant.What I have endeavored to point out herein above shows that the respondent appeared before the disciplinary hearing.The fact that he opted to call his witnesses to support what is pleaded in his defence does not mean that he was not heard as contended by Mr. Kachenje. The disciplinary committee was not obliged to force the respondent to make any testimony before it.Looking at what transpired before the disciplinary Committee it is quite unrealistic to rule out that the respondent was not heard.

With regard to the 5th ground, the evidence adduced proves that appellant conducted investigation before referring a case to a disciplinary Committee as required under the labour laws. With due respect to Mr. kachenje, the fact that DW1 is the one who ordered the investigation and participating in the conduct of the same cannot render the investigation and the report produced thereafter illegal. I entirely agree with the position of this Court

in the case of **Geita Gold Mining Ltd,** (supra), that the purpose of the investigation report is to enable the employer to make its decision whether to charge the employee or not , depending on the outcome of the investigation.Mr. kachenjes's argument that the respondent was neither involved in the investigation nor interrogated is unfounded, since there is no any requirement under the labour laws to interrogate the employee. In fact ,the law does not give any guidance on how the investigation should be conducted or formality of the investigation report. Therefore, the style and mode of investigation depends on the nature of the issue at hand and the way the employer deems fit under particular circumstances.

From the foregoing it is the finding of this Court that investigation was properly conducted and the investigation report was valid and legal.

I have also considered the concern raised by Mr. Mapembe that the respondent testified without being sworn. I checked the hand written proceedings of the CMA.The truth is that the respondent was sworn before giving his testimony.

In the upshot this application is allowed since the termination of the respondent from employment was substantive and procedurally fair. The award made by the Arbitrator is hereby set aside. This being a labour matter, each party will bear his own costs.

Dated this 9th day of August 2022

B.K.PHILLIP

JUDGE.