

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DISTRICT REGISTRY

AT TABORA

REVISION APPLICATION NO. 26 OF 2020

(Originating from Labour Dispute No. CMA/TAB/TBR-MSN/86/2018)

ALLIANCE ONE TOBACCO TANZANIA LIMITED.....APPLICANT

VERSUS

OBADIA MJELURESPONDENT

RULING

Date: 14/6/2022& 5/8/2022

BAHATI SALEMA, J.:

The applicant herein **Alliance One Tobacco Tanzania Limited** filed this application for revision of award in Labour Dispute No. CMA/TBR/86/2018 under section 91(1)(a) and 94(1)(b)(i) of the Employment and Labour Relations Act, 2004 as amended from time to time and Rules 24 (1), 24 (2); (a) (b) (c) (d) (e) (f) and 3(a) (b) (c) ,28 (1)(c) (d) & (e) of the Labour Court Rules, 2007 (GN No. 106/2007) and any other provision of the law against **Obadia Mjelu** herein named the respondent.

The background leading to this application stems from the fact that, the respondent was employed by the applicant way back in June, 1996 as a leaf classifier and after entering various employment contracts on 20 October, 2015 he entered a new contract as an area controller for three years which was to end on 19 September, 2018 and due to his misconduct on 9 July, 2018 he was terminated. Dissatisfied with termination **Obadia Mjelu** herein filed Labour dispute at the Commission for Mediation and Arbitration at Tabora (CMA) against the applicant in Labour Dispute No. CMA/TBR/86/2018 claiming reinstatement or in alternative payment of terminal benefits, severance allowance, payment of costs, payment of compensation to the tune of 12 months' salaries.

After the Mediation proved futile, the matter proceeded to the stage of Arbitration whereby on 13th July, 2020 parties were heard and the dispute was determined in favour of the applicant save that the respondent was awarded three months' salaries for the reason that he had worked for the company for a long time.

In this application, the applicant is seeking a revision of the decision of the Commission for Mediation and Arbitration which was procured on 13th July, 2020. The application is based on legal issues that

arise from the material facts that were stated in the applicant's sworn affidavit. The advanced ground was that;

- 1. Hon arbitrator erred in law and fact by holding that the respondent be awarded three months' salaries without any legal basis.*
- 2. That the court may be pleased to determine the dispute in the manner it considers appropriate;*
- 3. Any other relief the Honourable Court may deem fit and just to grant.*

With the leave of the court, the matter was argued by way of a written submission. The applicant enjoyed the services of Mr. Shukran Elliot Mzikila learned counsel whereas the respondent was represented by Mr. Joseph Madukwa, also a learned counsel.

Submitting in support of the application, the applicant referred this court to the award, whereby Hon. Arbitrator determined and held that the applicant had valid reasons and was substantively fair to terminate the employment of the respondent. However, Hon. Arbitrator pointed out and cured the same by holding that, it was not shown (no evidence) how much the respondent was affected during the hearing of the disciplinary committee in the absence of a representative from TPAWU.

Mr. Mzikila asserted that apart from the same being pointed out by Hon. Arbitrator, it is clear from Exhibit (DD4) the charge letter and the minutes of proceedings of the disciplinary committee, clause No. 7, that the respondent was given the opportunity to bring any representative of his choice. This included any representative from TPAWU but chose not to do so and proceeded on his own.

Further, he asserted that there was no evidence at all showing that the applicant prevented the respondent to bring or have any representative of his own choice, he decided to proceed on his own.

Mr. Mzikila also pointed out that at page 12 of the award; the Arbitrator believed and correctly held that the procedure aspect was complied. The same reads;

“... Tume inaona kuwa utaratibu ulizingatiwa ingawa si kwa ukamilifu wa asilimia mia moja kiasi cha kumnyima mtu haki za msingi...”

He contended that the applicant had valid reasons and followed fair procedure to terminate the employment of the respondent which should not be complied with in a checklist – fashion.

He beckoned to this court to uphold the application and the CMA – Award in terms of the reliefs (i.e award of three months' salaries) be quashed and set aside.

In reply thereto, the learned counsel for the respondent stated that the applicant embarked on the issue of three monthly salaries awarded to the respondent as the gist of their application and the argument for the counsel of the applicant is that the honourable arbitrator has no legal basis or valid reasons since he believes that the applicant had valid reasons and followed fair procedure to terminate the employment of the respondent.

He further asserted that the arbitrator found that the procedure was not fair to the same extent and there is a mistake which in his opinion does not affect the right of the respondent as stated on paragraph one of page twelve of the award that;

“... kwa kuakisi vipengele vyote hapo juu Tume imebaini ukiukwaji pekee wa utaratibu upo katika eneo moja tu la uwakilishi wa chama na kipengele cha muundo na uhuru was kamati ya nidhamu kinavishiria vya mashaka.....”Tume inaona kuwa utaratibu ulizingatiwa ingawa sio kwa ukamilifu wa asilimia mia moja kiasi cha kumnyima mtu haki za msingi.

Mr. Madukwa further stated that the question above from the award, shows that there is a procedural mistake done by the applicant in dealing with the termination of employment of the respondent, only this has been enough for the arbitrator to award twelve monthly

salaries to the respondent as required by Section 40 (a) and (e) of the Employment and Labour Relation Act, 2004.

He asserted that solving the dispute of employer and employee is one of the main roles of the Commissioner for Mediation and Arbitration is to maintain a good relationship between the parties to the dispute even after the dispute has been determined, the arbitrator has the power to order that, since there is a mistake or procedurally without considering the extent of that mistake the employer (Applicant) pay the twelve-monthly salaries but considering the good relationship and extent of the mistake done by the employer (applicant) and the respondent employed by the applicant for a long time since 1st June 1996 up to 09th July 2018 that is why the arbitrator went on awarding the respondent three monthly salaries instead of twelve monthly salaries which it also within their discretion as it was held in the case of Revision No. 218/2013 **QATAR Airways Vs Elizabeth M, Kuziwa DSM Registry** (unreported) that,

“In practice, a decision maker’s exercise of such discretion is guided by peculiar fact of each case”.

He added that the counsel for the applicant challenged the award by arguing that, the arbitrator was incorrect by awarding three monthly salaries to the respondent since there is no legal base to hold that after

the previous holding that, substantively and procedurally the respondent was fairly terminated. He correctly stated that the applicant's counsel wrongly interpreted the award because arbitrator stated that the procedure has not been correct but his view does not affect the right of the respondent, this does not give the right to the counsel of the respondent to say that the procedurally was fair.

Basing on what he submitted he prayed for a dismissal of the application for want of merit and upheld the CMA award and increase the three monthly salaries awarded as a relief to the respondent to twelve monthly salaries as required by section 40 (1) (a) and (c) of the employment and Labour Relation Act, 2004.

In a short rejoinder, Mr. Mzikila reiterated his submission in chief that the respondent's assertion that in complying with procedural aspects, it is a well-settled position that the employer should not conduct the same in a checklist – fashion. The employer has only the obligation to demonstrate that they gave every possible opportunity to the employee of defending himself before deciding to terminate him. For this reason, the arbitrator found that the employer did not prejudice the respondent at any rate, and found out the whole transaction comprised substantive and procedural fairness according to the law.

Having thoroughly considered the applicant's submission and that of the respondent, the issue for determination is whether the CMA wrongly awarded the applicant three months' salary without any legal basis.

There is no dispute that both parties agree in its judgment that the arbitrator ruled that the procedural was not fair to the same extent I quote in verbatim that;

"... kwa kuakisi vipengele vyote hapo juu Tume imebaini ukiukwaji pekee wa utaratibu upo katika eneo moja tu la uwakilishi wa chama na kipengele cha muundo na uhuru wa kamati ya nidhamu kinavishiria vya mashaka....." Tume inaona kuwa utaratibu ulizingatiwa ingawa sio kwa ukamilifu wa asilimia mia moja kiasi cha kumnyima mtu haki za msingi.

However the arbitrator went further to grant the award of 3 months' salaries instead of 12 months as required by sections 40(1) (a) and (c) of the Employment and Labour Relations Act, 2004.

As correctly submitted by the counsel for the respondent the arbitrator had the power to order since he found there was a mistake procedurally for non –representation and "Kipengele cha muundo wa uhuru wa Kamati ya Nidhamu". In the cited case of **QATAR Airways Vs**

Elizabeth M, Kuziwa DSM Registry, Revision No. 218/2013

(unreported) supra it is my considered view that since there was a mistake procedurally which in his view does not affect the right of the respondent, it does not give the right of the respondent to say that it was fairly procedure.

With due respect, I do not agree with the submission by the applicant's counsel that allowing such an argument by the respondent's counsel that since there was only a minor mistake and that the respondent worked with the applicant for such a long time then the employee/respondent should be entitled to the award will open a pandora box.

As noted from the records from Exhibit AOTT, DD4 collective the arbitrator noted that the representative did not participate. Equally, section 37(2) (c) Employment of Labour Relations Act, No. 6 of 2004 provides that;

"A termination of employment by an employer is unfair if the employer fails to prove;

c) That the employment was terminated in accordance with a fair procedure"

It is also a settled principle of law that the Employment and Labour Relations Code of Good Practice GN No.42 of 2007 provides for fairness of the procedures that;

13(3) The employee shall be entitled to a reasonable time to prepare for the hearing and to be assisted in the hearing by a trade union representative or fellow employee. ..." and section 13(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.

From the above provision, I do not subscribe to the applicant's view that since the arbitrator held that it had a valid reason and substantively fair to terminate the employment of the respondent but in terms of procedural aspects the arbitrator held that;

"The representation from TPAWU was not made part of the proceedings during the hearing of the disciplinary committee. That was only the part that was not complied with. "

From the extracts of the ruling of the Commission procedurally fairness in terms of representation was not complied and impartiality on the part of disciplinary committee. This is a serious legal frail. Having read the ruling of the CMA, it is apparent that the arbitrator paid

consideration to all witnesses that came before him, as is reflected in the ruling.

Having said that, I uphold the decision of the Commission for Mediation and Arbitration and, consequently, the application is found unmeritorious.

Order accordingly.



A. BAHATI SALEMA

JUDGE

05/08/2022

Ruling delivered in chamber on this 05th August, 2022 in the presence of both parties.



A. BAHATI SALEMA

JUDGE

05/08/2022

Right of Appeal fully explained.



A. BAHATI SALEMA

JUDGE

05/08/2022

